No. 981752 APR 28 1999

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In The
Supreme Court of the United States

October Term 1998

**GRANDEOTTO, INC., a corporation;
BERNARD J. and KATHY A. FOLIO;
MID-CITY LAND CO.;
BERNARD J. FOLIO, d/b/a Highrise Associates;
KATHRYN FOLIO; JOSEPH FOLIO ,**

Petitioners,

v.

CITY OF CLARKSBURG, a municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WEST VIRGINIA

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the West Virginia Supreme Court's refusal to address Petitioner's federal due process and equal protection claims and refusal to apply federal constitutional law in disposition of such claims contravene the Supremacy clause? (U.S. Const. Art. VI, Cl.2).

2. Does an unlawful taking of property occur, or is federal due process otherwise offended, when a state government taxes its citizens for proprietary government services in direct contravention to its constitution, but calls it a fee, when the revenue measure has already been determined to be a tax under federal constitutional law? (U.S. Const. Amd XIV)

3. Is the fire service charge per se discriminatory and thus in violation of federal equal protection because it cannot be enforced against the federal government and its instrumentalities as a matter of federal constitutional law, and has not been enforced against various other entities? (U.S. Const. Amd. XIV)

4. Does federal equal protection and specifically, rational basis testing, require some identifiable relationship between residential and commercial property owners and the use of fire services to justify the invidiously disproportionate charges imposed upon them? (U.S. Const. Amd. XIV).

PARTIES TO THE PROCEEDING

The parties to the proceedings below at Case No. 25143 were as the caption appears. B.J. Folio, Inc. is the parent company of Grandeotto, Inc. and Mid-City Land Company.

Additional parties were the City of Huntington, West Virginia, Appellee, and The Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Appellants at Case No. 25401; and The Wheeling College, Inc., The Most Reverent Bernard W. Schmitt, Bishop of the Diocese of Wheeling- Charleston, Appellants, and The City of Wheeling, West Virginia, Appellee, and The City of Wheeling, West Virginia, Appellee and The Ohio County Board of Education, Appellant at Case No. 25402. The Cases at No. 25401 and 25402 were consolidated with this action (No. 25143) by Motions to Intervene and to Consolidate which were granted by the West Virginia Supreme Court of Appeals.

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I. CITATIONS TO AND DECISIONS AND OPINIONS OF THE COURTS BELOW

The Memorandum of Decision and Order of the Circuit Court of Harrison County, West Virginia (A 46) is unreported[1].

The Per Curium Opinion of the West Virginia Supreme Court of Appeals affirming the Circuit Court and the Dissenting Opinions thereto (A 1, 15), as well as the Orders granting certiori (A 28), intervention and consolidation (A 23, 26) and denying rehearing (A30)and stay of mandate (A 19) are unreported as of the date hereof.

The Order (A 62) and Memorandum of Opinion and Order (A 58) of the District Court granting the City of Clarksburg's F.R.C.P. 12(b) Motion to Dismiss Petitioner's 28 U.S.C. §1983 action under the Tax Injunction Act (28 U.S.C.§1341) are unreported.

The Opinion of the Fourth Circuit Court of Appeals affirming the U.S. D.C. for the Northern District of West Virginia dismissing Petitioners' parallel 28 U.S.C. § 1983 action is published at 134 F3d. 1211 (4th Circuit, 1998) (A 33). The Order of the Fourth Circuit denying Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc is unreported (A 30).

II. JURISDICTION

The Per Curium Opinion of the West Virginia Supreme Court of Appeals was entered on December 15, 1998 (A 1). That Court denied a timely Petition for Rehearing on January 28, 1999 (A 30). Jurisdiction in this Court is invoked pursuant to 28 U.S.C. §1251 and 1257.

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[1] "A___" references are to the separately bound Appendix volume filed herewith. "R.R." references, infra, are to the separately bound reproduced record filed with the West Virginia Supreme Court.

III. CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

(A) Article VI, Clause 2 of the Constitution of the United States (A 103) provides in pertinent part:

> "This Constitution and the laws of the United States which shall be made in pursuant thereof... shall be the supreme law of the land; and the judges of every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding."

(B) Section 1 to the Fourteenth Amendment to the Constitution of the United States (A 104) provides, in pertinent part:

> "[n]or shall any state deprive any person of... property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(C) The Fifth Amendment to the Constitution of the United States (A 102) provides in pertinent part:

> "No person shall [be]... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(D) West Virginia Code §8-13-13 (A 105) provides in pertinent part:

> "[n]otwithstanding any charter provision to the contrary, every municipality which furnishes an essential or special municipal

service, including... fire protection, shall have plenary power and authority.... to impose by ordinance upon the users of such services reasonable rates, fees and charges to be collected in the manner specified in the ordinance."

(E) The Codified Ordinances of the City of Clarksburg at No. 92-4, §957.11 (A 107) provides in pertinent part:

	Fire Fee Protection Service
Owner - residential unit structure	$60.00 per year
Owner - duel residential unit structure	$60.00 per year
Owner - multiple family residential unit structure	$.045 x gross square feet-minimum $36.00/per year (Total number of sq. feet contained in the structure times four and one-half cents (.045) per year)
Owner - non-residential unit structure	$.045 x gross square feet-minimum $36.00 per year (Total number of sq. feet contained in the structure times four and one-half cents (.045) per year)

Non-residential tenant unit structure	$.225 x gross square feet-minimum $36.00 per year (Total number of sq. feet contained in the structure times four and one-half cents (.045) per year)

IV. STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

Petitioners are all landowners of property situate within the City of Clarksburg who have been subjected to the Ordinance[2] (A 105) . The Ordinance was enacted pursuant to West Virginia Code 8-13-13 (A 105). This Code section authorized local governments to enact ordinances for the imposition of reasonable "fees" upon the "users" of municipal services to defray certain municipal operating costs, in this case, the Ordinance was enacted to fund the City's cost of fire protection services.

As applied to this case, the Ordinance extracts a charge from owners and lessees of real property located within the City in varying amounts depending upon the owner's or lessee's classification as a "user" of fire services and the square footage of the premises owned or leased. Additionally, and although the Ordinance is silent on this point, 50% of the fees are apparently imposed for the ownership or possession of any personal property located within any given structure (RR. Vol. I, p. 209; RR Vol. II, p. 252). The residential and non-residential classifications contained in the Ordinance were not created on the basis of the costs of fire protection associated with any particular classified "user", or any other identifiable criteria. Lawsuits

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[2] The term "Ordinance" as used herein, includes all enactments by the City of Clarksburg pursuant to W.Va. Code 8-13-13 which were the subject matter of the proceedings in the State Courts.

were initiated by the City of Clarksburg against the Petitioners for the collection of fire service "fees" assessed against them during the period 1990-1993. It is not disputed that the Ordinance imposes said "fees" utilizing a square footage method of assessment (A 6), and that if the "fees" are really "taxes", then the same are unlawful as proscribed by the Tax Limitation Amendment to the West Virginia Constitution (W. Va. Const. Art. 10, §1).

B. STATE COURT JUDGMENTS/ FEDERAL CONSTITUTIONAL ISSUES

Petitioners attempted to challenge said "fees" defensively in state Court, raising, inter alia, both due process and equal protection claims under the United States Constitution in their Answers to the Complaints filed against them. The Circuit Court of Harrison County ultimately granted Summary Judgment in favor of the City of Clarksburg and denied Petitioner's Motion for Summary Judgment under W. Va. R.C.P. 56 (A 47,56). A Petition for Allowance of Appeal was granted by the West Virginia Supreme Court of Appeals by a 4-1 vote (A 28). Prior to oral argument thereon, the parties at Case Nos. 25401 and 25402 successfully intervened, and their cases were consolidated with the instant case for disposition (A 23, 26). By a 3-2 vote, the West Virginia Supreme Court affirmed the Courts below in all three consolidated cases (A 14).

In all three cases, the West Virginia Supreme Court majority ignored the parties' federal substantive due process and equal protection claims (U.S. Const. Amd. XIV), thus failing to apply federal constitutional law thereto. Instead, the Court reiterated its prior holding in City of Huntington vs. Bacon, et al. 196 W. Va. 457, 473 SE2d 743 (1996) (A 1, 2, 13) which held that as a matter of state constitutional law only, a municipal fire service charge which is based on the square footage method of assessment extracts "user fee" and not a "tax" from its respective subjects. In Bacon, the Court

refused to apply the Fourth Circuit's ruling in U.S. vs. Huntington, 999 F.2d 71 (CA 4, W. Va. 1993) Cert. Den. 114A. S.CT 1048, 127 L.Ed 371 (1994) (A 76), wherein the Court found as a matter of federal constitutional law, that such a charge is a "tax in the most classic sense of the term" and "a thinly disguised tax" (A 97, 99)[3].

This Petition is limited to the federal constitutional issues raised below concerning substantive due process (taxation) and equal protection (arbitrary classifications). With respect to taxation, two Justices of the West Virginia Supreme Court in their dissenting opinions, labeled the revenue measure "a wolfish tax which is cloaked in the garb of a sheepish fee." (A 15)[4] . With respect to equal protection, it is a given that the Ordinance cannot be enforced against the federal government and its instrumentalities (U.S. vs. Huntington, supra), and has not been enforced against various other entities.

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[3] It is not and has never been disputed that the Clarksburg and Huntington Ordinances are "essentially indistinguishable" (A 1, 44) in the context of taxation. The Clarksburg Ordinance however, because it creates arbitrary classifications of users who are charged different "fees", implicates equal protection beyond the foregoing statement.

[4] The City of Clarksburg admitted that if the revenue measure constitutes a "tax", then the same would violate the W.VA Tax Limitation Amendment (W.Va. Const. Art. X §1, A 110). In the context of taxation, there is no substantive distinction between this case and Case Nos. 25401, 25402, which cases were consolidated with this case for disposition. The Huntington, Wheeling and Clarksburg Ordinances are all based on the square footage method of assessment. The Grandeotto, et al. Appellants are not immune from taxation by virtue of W. Va. Code 11-3-9, but by virtue of W Va. Const. Art. X, §1. Justice Maynard's dissent, although correct in its substantive analysis, is incorrect in its conclusion that "there is no reason the Appellants in Case No. 25143 should not pay the 'fee' at issue, since unlike churches and schools, they are not exempted under W. Va. Code 11-3-9. Dissent, Maynard, J. at p. 1, fn. 1.(A 15).

C. UNITED STATES COURT JUDGMENTS/ FEDERAL CONSTITUTIONAL CLAIMS

In an effort to secure the state court's loyalty to the United States Constitution, Petitioners initiated a parallel[5] federal civil rights action (28 U.S.C. §1983) in the United States District Court for the Northern District of West Virginia, Folio, et al. v. City of Clarksburg, 134 F.3d (4th Cir., 1998) (A 33). In said District Court action, the same due process and equal protection violations were alleged. That action was dismissed by the District Court on the City's F.R.C.P. 12(b) Motion (A 62), which Motion invoked the Tax Injunction Act (28 U.S.C. §1341) as a basis for lack of subject matter jurisdiction. An appeal to the Fourth Circuit Court of Appeals ensued.

In said appeal Appellants argued that the Fourth Circuit, applying principles of federal constitutional law in U. S. vs. City of Huntington, supra, has already determined that the City of Huntington's Ordinance imposed an unlawful tax on property owners located within the City of Huntington. The Opinion by the Fourth Circuit in U. S. vs. Huntington, supra, is diametrically opposed to the West Virginia Supreme Court's ruling in City of Huntington vs. Bacon, supra and this case. Thus, the Fourth Circuit, applying federal constitutional law, (U. S. vs. City of Huntington, supra at p. 73 citing, inter alia, U.S. vs. Allegheny, 322 U.S. 174, 184; 64 S.Ct. 908, 914; 88 L.Ed 1209 (1944) has held that the service fee imposed by the City is a "tax in the most classic sense of the term" and "a thinly disguised tax" (A 97, 99), while the highest West Virginia state court, applying state constitutional law only, has held the measure to be a lawful "fee" (A 77). Petitioners' argued

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[5] In the State Court actions, which were consolidated at No. 93-C-609-2, the City sued Petitioners for fees due during the period 1990-1993. In the District Court action, Petitioners sought a Declaratory Judgment concerning the fees for the period 1993-1996.

that the Tax Injunction Act (28 U.S.C. §1341) should not preclude federal court jurisdiction in that case because no "adequate" remedy was available in the West Virginia State Courts to adjudicate Petitioners' federal constitutional claims[6]. Petitioners further argued that the City should be estopped to claim the "fees" are "taxes" in federal court to defeat federal court jurisdiction, only to claim the "taxes" are really "fees" in state court under the auspices of Bacon, supra. In a published opinion, the Fourth Circuit affirmed the district court (cite, A 45) but held:

> "This court has previously considered an essentially indistinguishable West Virginia municipal ordinance imposing fire service protection fees, and there we concluded that it constituted a tax within the meaning of the Tax Injunction Act because liability for the fee was based upon a resident's property owner status instead of his use of the city service. See City of Huntington, 999 F.2d at 73-74. We are not able to distinguish the fire service protection fee at issue her from the one the court studied in City of Huntington, and, as did that court, we conclude that the fee is a tax for purposes of the Tax Injunction Act (A 44; emphasis added).

A Petition for Rehearing was subsequently denied (A 30). As previously stated, the West Virginia Supreme Court, while it exercised its discretionary jurisdiction over this case,

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[6] There is no Appellate Court system in West Virginia. Review by the West Virginia Supreme Court is discretionary. Declaratory judgment actions are discretionary. The City of Clarksburg has even unlawfully created a "Fire Service Appeals Board", which under the Ordinance now purports to constitute an aggrieved taxpayers sole and exclusive remedy of right Ordinance at § 957.16 (cf: A 42)

then proceeded to ignore Petitioners' federal due process and equal protection claims.

D. REASONS FOR GRANTING THE WRIT

Intervention by this Court is necessary to resolve a controversy which goes to the very core of the purpose for the enactment of the Fourteenth Amendment - to protect the fundamental federal constitutional rights of the citizens of a state from arbitrary and oppressive actions of state government. In this case, the West Virginia Supreme Court completely ignored Petitioner's duly asserted federal constitutional rights, reaching a determination under state law only, which determination is the polar opposite of that reached by the Fourth Circuit on an identical issue and under federal constitutional law in any event.

This case is not about a state court and federal court reaching diametrically opposed results on an identical issue under state law and federal law respectively where no federal constitutional rights are involved. Where federal constitutional rights are involved, state courts are bound by federal constitutional law. Had the West Virginia Supreme Court applied federal constitutional law to Petitioners' federal rights, the result would have been a ruling in their favor.

This Court is truly a court of last resort. Petitioners have attempted to invoke the safeguards of their federally protected rights not only in state court to no avail, but also in the parallel Federal District Court action under 28 U.S.C. §1983 where their claims were squarely defeated under the Tax Injunction Act. Intervention is necessary, otherwise it is certainly fair to conclude that Petitioners' federal constitutional rights are only illusory; that is to say they are rights without remedies.

V. ARGUMENT

(A): Did the West Virginia Supreme Court's refusal to address Petitioners' federal due process and equal protection claims and refusal to apply constitutional law in disposing of such claims contravene the Supremacy clause? (U.S. Const. Art. VI, Cl. 2).

Just as federal courts are often obligated to apply rules of decision provided by state law, see Erie Railroad Co. v. Thompkins, 304 U.S. 64, 58 S. Ct. 817 (1938), the Supremacy Clause of the U.S. Constitution requires state courts to apply federal law wherever appropriate. U.S. Const. Art. VI, Cl. 2 (A 103); see also Public Service Comm'n of Utah, v. Wycoff Co., Inc., 344 U.S. 237, 247-48, 73 S.Ct.236, 242 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws."). When appropriate, the U.S. Constitution is the "supreme Law of the Land." U.S. Const. Art. VI; see also W.Va. Const. Art. I, §3.

The West Virginia Supreme Court had "a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [were] protected'". See Felder v. Casey, 487 U.S. 131, 151, 108 S.Ct. 2302, 2313-14 (1988) (quoting Garrett v. Moore-McCormack, Co., 317 U.S. 239, 245, 63 S. Ct. 246, 251 (1942)). In the absence of a "valid excuse", the West Virginia Supreme Court was obligated to consider the federal claims put before it. See Howlett v. Rose, 496, U.S. 356, 369-70, 110 S.Ct. 2430, 2439-40 (1990).

The West Virginia Supreme Court's failure is not "excused" for any of the potential reasons identified by the Howlett Court. Said Court did not point to any "neutral rules of judicial administration", (see Howlett 496 U.S. at 374-75, 110 S.Ct. at 2442), nor did it suggest a lack of jurisdiction to

consider the Petitioners' claim. See id. at 369-70, 110 S. Ct. at 2439-40; cf: Folio v. City of Clarksburg (Petitioners' parallel action, holding that the West Virginia courts offer adequate remedies to taxpayers raising federal constitutional challenges to the validity of a tax). The West Virginia Supreme Court should have addressed the Petitioner's constitutional claims.

By failing to address the federal constitutional issues presented in the consolidated appeals, this Court has left this case in the same procedural posture as that reviewed by the United States Supreme Court in Allegheny Pittsburgh Coal vs. County Commissioners of Webster County, W. Va., 488 U.S. 336, 109 S.Ct. 633 (1989). In said case, the United States Supreme Court granted certiori to consider the federal issues never addressed by the West Virginia Supreme Court. 488 U.S. at 342, 109 S. Ct. at 637. Ultimately, the United States Supreme Court held that the County's purchase value assessment method violated the equal protection clause of the 14th Amendment, reversed this Court, and struck down the Webster County assessment methodology as a matter of federal constitutional law. Id. at 346, 109 S. Ct. at 639. As in Allegheny Pittsburgh Coal, the West Virginia Supreme Court has manifestly overlooked the presence of federal constitutional claims and issues, which it was obligated to consider.

(B): Does an unlawful taking of property occur, or is federal due process otherwise offended when a state government taxes its citizens for proprietary government services in direct contravention to its constitution, but calls it a fee, when the revenue measure has already been determined to be a tax under federal constitutional law? (U.S. Const. Amd XIV)

Federal Due Process

The very touchstone of due process is the protection of individuals against arbitrary actions of government. Wolff vs. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, (1974). The Fourteenth Amendment does not operate to deprive states of their lawful power and of the right to resort to reasonable methods inherently belonging to the power exerted. The provisions of the due process clause only restrain "... those arbitrary and unreasonable exertions of power which are not really within lawful state power..." American Land Co. vs. Zeiss, 219 U.S., 67, 31 S. Ct. 200 (1911) (emphasis added). For purposes of the Fourteenth Amendment, actions by a municipality are deemed actions of the state Lovell vs. Griffin, 303 U.S. 444, 58 SCt. 666 (1938).

In a federal due process law analysis, only the determination of whether Appellants have a "property interest" is a matter of state law. "If a property interest is found to exist, the second question - what process is due - is a matter of federal law". Kovats vs. Rutgers, 749 F.2d 1041 at 1047 (3rd Cir., 1984) citing Memphis Light, Gas and Water Division vs. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56, L.Ed 2d 30 (1978); U.S. Const. Amd. V, XIV. To arbitrarily label the municipal charges for fire services under the City of Clarksburg Ordinance as "fees" is an arbitrary and unreasonable exertion of municipal and thus state power,

which operates to deprive Petitioners of their property as a matter of federal due process.

The Huntington cases are intriguing (A 63, 94). It seems extraordinary for a federal circuit court applying federal constitutional law to summarily and without reservation label the charges imposed under the Ordinance as "a tax in the most classic sense of the term" and "a thinly disguised tax" (A 97, 99), while in juxtaposition, a state Supreme Court justifies a polar opposite conclusion under principles of state constitutional law only, ignoring both federal constitutional law and logic (A 77).

As the following discussion will demonstrate, the "thinly disguised tax" was thinly distinguished by the West Virginia Supreme Court of Appeals, and the instant case is governed by and controlled by U. S.vs. City of Huntington, supra, or federal constitutional law which in any event yields the same result.

As stated, the West Virginia Supreme Court of Appeals distinguished City of Huntington v. Bacon, supra, from U. S. v. City of Huntington, supra, solely on the basis that no federal right was asserted by the Plaintiffs in the former, while a federal right (ie., the Supremacy Clause) was asserted in the latter:

> "Where a federal right is involved, a federal court is not bound by the characterization given to a state tax by a state court nor relieved from the duty of considering the real nature of the tax and its effect on the federal right asserted." City of Huntington v. Bacon, supra at p. 11; Hartford County, 512 F. Supp. at 242 (citing Carpenter v. Shaw, 280 U.S. 363 at 367-368, 50 S. Ct. 121 at 122-123 (1930); United States v. Allegany 322 U.S. 174, at 184; 64 S. Ct. 908 at 914 (1944).

* * *

> "It follows, therefore, that a state court is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the constitution of the United States" City of Huntington vs Bacon, supra (A76).

Because no federal constitutional rights were in issue, the West Virginia Supreme Court decided the case pursuant to state law only. Under federal due process, said Court was bound by federal constitutional law, and the Fourth Circuit's characterization of this revenue measure as a tax (id.).

The same operative federal substantive law provisions were invoked by the West Virginia Supreme Court in this case to avoid the application of federal constitutional law and U.S. vs. Huntington (A 13), constituting the only explanation for the Court's short-changing of Petitioners' federal constitutional arguments:

> "The Bacons and the Board of Education were found to be subject to the fee even though the federal government was not obligated to pay pursuant to the Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution. By way of explanation, this Court stated:
>
> > [Where a federal entity is involved, the federal courts may determine a particular funding mechanism employed by a state or its political sub-division is, in fact, a tax[.] It follows, therefore, that a state

> is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the Constitution of the United States (citation omitted).
>
> Bacon at 464-65., 473 S.E. 2d at 750-51. The Fourth Circuit's holding did not apply to the Bacons or the Board of Education. The same is true for the appellants in the case sub judice. (emphasis added) (A 13).

Numerous citations appear in the above-quoted excerpt taken from the opinion in Bacon, as well as other federal constitutional law provisions which, when genuinely analyzed, make it abundantly clear and dispel the notion that the ruling in U.S. vs. Huntington is not confined to "federal entities" asserting "federal rights".

According to the West Virginia Supreme Court, the federal government is entitled to a determination that the "fee" is not a "tax", while private citizens are not, arguably because the holding in U.S. vs. Huntington, supra, is limited to a federal entity asserting its federal right not to be taxed by a state government under the Supremacy Clause. The Court's tacit approval of a "dual system" of federal rights, is not only nonsensical, but is contrary to the most basic and fundamental underpinnings of both the Fourteenth Amendment to the U.S. Constitutional and the Supremacy Clause.

Quite plainly, the Supremacy Clause stands for the proposition that the federal constitution and federal laws

supersede any law of any state which seeks to restrain their scope and/or are inconsistent therewith (see discussion (A), supra).

In the seminal case of McCullogh vs. Maryland, 17 U.S. (4Wheat) 316, 4 L.Ed 579 (1819), the United States Supreme Court determined that, as a matter of federal constitutional sovereign immunity, states are without power to tax the federal government. Because the federal constitution is the supreme law of the land under the Supremacy Clause, the state law seeking to impose a tax on the federal government must yield thereto. (see also United States vs. Hartford County, 572 F. Supp. 239 (1983), cited by the Court in Bacon, supra, at 473 SE2d 750, where the first issue, as in U.S. vs. Huntington, was whether the revenue measure constituted a tax). The federal right involved in these cases was the sovereign immunity of the federal government, which federal immunity superseded any effort by the state to tax the federal government under and by virtue of the Supremacy Clause.

"Federal rights" however, include due process and equal protection under the Fourteenth Amendment (U.S. Const. Art. XIV), which extend to each and every citizen of every state. As applied to this case, the Fourteenth Amendment was enacted to extend the fundamental right of due process as contained in the Fifth Amendment to the U.S. Constitution (A 102) to all citizens of all states:

> "The Fourteenth Amendment legitimately operates to extend to citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress." Hibben vs. Smith, 191 U.S. 310, 24 S. Ct. 88, 48 L.Eed. 195 (1903); Paul vs. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed

2d 405, reh. den. 425 U.S. 985, 96 S.Ct. 2194, 48 L.Ed2d 811 (1976) (A 76).

The following passage from the Opinion in Bacon, supra, leaves no doubt that the West Virginia Supreme Court fully understood and acknowledged that a 'federal right' is not limited to the "immunity provided to the federal government and its instrumentalities":

> "The only limitations the Supreme Court of the United States may impose upon a state's power to determine its own fiscal policies are those expressed in the Constitution of the United States (citing Kentucky Union Co. vs. Kentucky, 219 U.S. 140, 51; 31 S.Ct. 171, 176, 55 L.Ed 137, 154 (1911). One such limitation expressed in the Constitution of the United States is that the federal government is not subject to any taxation by a state or political subdivision unless explicitly authorized by congress (emphasis added; citing McCullogh vs. Maryland, supra and Hartford County, supra).

That a "federal right" is not limited to one asserted by a federal entity was equally disposed of by the West Virginia Supreme Court by virtue of the foregoing passage, and by virtue of its citation of Kentucky Union Co., supra and Wisconsin vs. J.C. Penney, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed 267 (1940); Bacon, supra at 473 S.Ed 2d 750, which cases involve a state's legitimate police power to tax private persons.

With or without the holding in U.S. vs. Huntington, supra, the same result would occur. For purposes of federal constitutional, statutory and common law, the question of whether a particular charge is a "tax" is determined by reference to federal law rules of decision. In U. S. vs. City

of Huntington, supra, the court looked to federal law in concluding that the defendant city's "municipal services fee" was a tax from which the federal government was immune. And in Carpenter v. Shaw, supra, the Court looked to federal law to determine whether a state-imposed tax on oil and gas royalties was invalid as applied to the petitioner because it was inconsistent with a granted tax exemption.

The question of whether the fire service charge levied by the City of Clarksburg is a "tax" is properly a question of federal law. Under federal law, federal courts assume that a service fee based solely upon some potential use, rather than actual use of a municipality's fire services is a tax. See id.

The difference between a "tax" and a "fee" was very clearly explained by the Court in U.S. vs. Huntington under principles of federal constitutional law:

> "Users fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are 'enforced contribution[s] for the support of government'. United States vs. La Franca, 282 U.S. 568, 572 51 S. Ct. 278, 280, 75 L.Ed. 551 (1931). Liability for the 'user fee' charged by the City arises from GSA's and USPS's status as property owners and not from their use of a City services. See Michelin Tire Corp. vs. Wages, 423 U.S. 276, 287, 96 SD. Ct. 535, 541, 46 L.Ed. 2d 495 (1976) ['Ad valoeum] property taxes are taxes by which a State apportions the cost of such service as police and fire protection among the beneficiaries according the their respective wealth...')." (A 99).

If fees are not closely tied to "use", as opposed to "ownership" of property, the dangers are great: "Fire and flood protection and street maintenance are core governmental services... Under the theory advanced by the

City, virtually all of what are now considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into constituent parts eg., a police fee".(id at A 98-99).

That the Service Fee is a tax, rather than a fee, for the purposes here is made even more clear by the following analytical model upon which the Fourth Circuit in Folio vs. City of Clarksburg, supra, relied:

> [Courts] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

123 F. 2d at 800 (quoting San Juan Cellular Telephone Co. v. Public Service Comm'n, 967 F.2d 683, 685 (1st Cir. 1992).

Consistent with this logic, the Service Fee is obviously a tax. The Service Fee is assessed pursuant to a general ordinance of the City, rather than as any sort of special assessment by the City's fire department itself. It is levied on each non-federal property owner without regard to that individual's actual use of fire services. It is clearly collected for the benefit of the entire community, and it offered no evidence that it has ever expended any funds at all

in either providing fire prevention services to the Petitioners or extinguishing any fires on those properties. Thus, for purposes of federal law, the Service Fee is a "tax", the imposition of which constituting a palpably arbitrary exercise of the City of Clarksburg's police power, and a denial of federal due process. Kovats, supra at 1047; J. C. Penney, supra, at 249; Village of Norwood vs. Baker, 172 U.S. 269, 19 S.Ct. 187 at 193 (1898).

Petitioner's contend that the West Virginia Supreme Court was thus nonetheless constitutionally steered to the Fourth Circuit's conclusion:

> "We are unable to discern any relevant difference between the square footage method of assessment and the ad valorem method. The service fee is a thinly disguised tax." id. at 74.

The assertion of Petitioner's due process right is one of much substance, and is conceptually identical to the right asserted in Norwood, supra.

In that case, the Village of Norwood, Ohio, enacted an Ordinance assessing upon Appellee Baker's land, abutting on each side of a new street, an amount covering not simply a sum equal to that paid for the land taken for the street, but in addition, the costs and expenses connected with the condemnation proceeding. "The Plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment, providing that no state shall deprive any person of property without due process of law... as well as the bill of rights of the Constitution of Ohio." id at 190. This Court initially noted that ... "the assessment of the abutting property for the cost and expenses incurred by the Village was an exercise of the power of taxation", and that "except for the provision of the Constitution of Ohio above-quoted, the state could have authorized benefits to be deducted from the actual value of

the land taken without violating the (United States Constitution)" id.

The Court in Norwood, quoting from Williams vs. Eggleston, 170 U.S. 304, 18 S.Ct. 619, went on to state:

> "Neither can it be doubted that if the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property." id.[7]

Norwood is conceptually indistinguishable from the instant case: In Norwood, the City claimed that the assessment was a legal "tax" under Ohio law, while the appellee maintained that the revenue measure was outside the police power to tax, proscribed by the Ohio Constitution, and constituted a taking of property without due process of law because the "tax" bore no relationship to the benefits received.

In the instant case, the City claims that the assessment is a legal "fee" under West Virginia law, while Petitioners maintain that the revenue measure was outside the police power to exact a fee, proscribed by the West Virginia Constitution, and constitutes a taking of property

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[7] "The views we have expressed are supported by other adjudicated cases, as well as by reason, and the principles which must be recognized as essential for the protection of private property against the arbitrary action of government" Norwood, supra at 19 S.Ct. 192.

without due process of law because the "fee" bears no relationship to quantum of use.

As aptly re-stated by the Court in Norwood:

> "If a sovereign breaks open the strongbox of an individual...and takes out money... it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it 'taxation'." id at 193.

In passing on the federal constitutional validity of the Ordinance, the Circuit Court, and then the United States Supreme Court affirming, found that the assessment was... "in violation of the Fourteenth Amendment of the Constitution of the United States, forbidding any state from depriving a person of property without due process of law." id. at 187, 191.

In the instant case, the revenue measure is a "tax", its exaction is admittedly not within the lawful police powers of the City of Clarksburg (W. Va. Const. Art. X, §1; W. Va. Code 8-13-13) and it constitutes a taking of property without due process of law in violation of the Fourteenth Amendment. Village of Norwood, supra. In this context, this case is absolutely indistinguishable from any other case where a state or political subdivision thereof, exceeds its jurisdictional power to tax (eg., a foreign corporation by virtue of the commerce clause, or the federal government by virtue of federal immunity).

(C): Is the fire service charge per se discriminatory and thus in violation of federal equal protection because it cannot be enforced against the federal government and its instrumentalities as a matter of federal constitutional law, and has not been enforced against various other entities? (U.S. Const. Amd XIV)

The Equal Protection clause protects private parties against legislation or regulation that is (1) discriminatory on its face, see eg., City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 450, 105 S.Ct. 3249, 3260 (1986) (invalidating special use permits not required for others), or (2) is adopted with discriminatory intent, see e.g. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886) (invalidating municipal ordinance the effect of which was to force Chinese-owned laundries out of business) or, (3) although facially neutral, is enforced in a discriminatory manner, see eg., Allegheny Pittsburgh Coal Co. v. County Commissioners of Webster County , supra, (invalidating county property tax assessment system that "select[ed recent transferees of real property] out for discriminatory treatment by subjecting [them] to taxes not imposed on other members of the same class"; quoting Hillsborough v. Cromwell, 326 U.S. 620, 623, 66 S.Ct. 445, 448 (1946)).

As a matter of federal constitutional law, the City must exclude the federal government from the service charge. This practice raises the same concerns that this Court found to be unacceptable in Allegheny Pittsburgh Coal, supra, wherein it was held that, given the structure of West Virginia's system of taxation, the county's assessments violated the Equal Protection Clause. This Court carefully pointed out that the Equal Protection Clause could tolerate short delays in the fair application of tax rates, id., at 343, 109 S. Ct. at 638, and that the states were generally free to create reasonable classes of taxpayers and assign differing

tax burdens to each of those classes, id, at 344, 109 S. Ct. at 638. West Virginia law, however, was devoid of any provision suggesting that recent purchasers of property would be taxed any differently than persons who had owned their property for some period of time, or that the State's counties had the power to create such classes. Id. at 345, 109 S.Ct. at 638-39. The County's assessment system, therefore, could not withstand equal protection scrutiny.

The City's scheme for assessment of the service fee charge suffers from the same flaws found to be fatal in Allegheny Pittsburgh Coal. There is no dispute that Petitioners are immune from any obligation to pay "taxes" to the City on the properties involved here, (W. Va. Const. Art. X, §1) (A 110) and that the City does not collect the service charge from entities of the federal government. Both the federal government and Petitioners are immune from taxation - one pays and one does not.

As in Allegheny Pittsburgh Coal, this de facto discrimination is unsupported in State law. The West Virginia Legislature did not distinguish property owners such as Petitioners from the federal government. Instead, under W. Va. Code §8-13-13, the Legislature created one class of potential "users" subject to the tax. Nothing in the text of that section or its history would support tax treatment of federal property in a manner any different from the treatment of any other property [8]. The West Virginia Supreme Court firmly establishes this principle in Bacon:

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[8] Even if under federal law the service charge is a "user fee" in this context, the City's practice still could not withstand scrutiny W.Va. Code 8-13-13 recognizes no classes and contains no suggestion that federal property should be exempt therefrom. The Allegheny County Pittsburgh Coal Court cautioned that local governments cannot create classifications unless authorized to do so by state law. See 488 at 345, 109 S. Ct. at 639. In any event, the City has made absolutely no effort to classify federally owned property differently from property owned by any other person or entity.

> "The consensus of opinion appears to be that a property tax is a charge on the owner of property by reason of his ownership alone without regard to any use that might be made of it" (citing, inter alia, Bromley v. McCaughan, 280 U.S. 124 136, 50 S.Ct. 46, 47; 74 L.Ed 226 (1929)... The Bacons and the Board focus on the above definition in isolation which can often be misleading. For example, in this case, the City imposed its municipal service fee on the primary users of its flood and fire protection services. These primary users happen to be property owners. Thus, the City did not impose the municipal fee on owners of property by reason of their ownership alone. Instead, the fee is imposed upon the property owner by reason of their use of fire and flood protection services. Therefore, the municipal service fee is not a tax in this instance." (A 82).

Moreover, the West Virginia Legislature has failed to heed the warning of the Bacon Court, in apparent recognition of the effect of the Fourth's Circuit's decision in U. S. v. City of Huntington:

> "We make the above holdings with reservations [which] should not open the floodgates to creative financing so that a municipality fees a citizen to death, thereby doing exactly what the Tax Limitation Amendment... sought to prevent. For this reason, we strongly encourage the legislature to.. attempt to more explicitly define the authority of municipalities to impose user fees or charges so as to protect our state citizens. The legislature should specifically

> list whom, it anyone is exempt from paying the user fee. If and when the legislature *makes such a list, it should be mindful of the* provisions of the West Virginia Constitution, such as our equal protection provision."

473 S. E. 2d at 757 (A 91-92). As a result, the service fee must be assessed against all property owners, which it is not. In addition to the federal government, instrumentalities of state, county and city government have also been systematically immunized from enforcement of the Ordinance (see eg., Depo., P. Shives, RR. Vol. I at p. 131, 136, 145; A 10, 11)

Because W. Va. Code 8-13-13 does not provide for the exclusion of any person or entity from the service charge, the Ordinance is per se discriminatory, or has been applied in a discriminatory manner in violation of equal protection.

> **(D): Does equal protection, and specifically, rational basis testing, require some identifiable relationship between residential and commercial property owners and the use of fire services to justify the invidiously disproportionate charges imposed upon them? (U.S. Const, Amd. XIV)**

For purposes of equal protection, the classifications contained in the Ordinance must be rational and reasonable, and grounded upon real differences. Said classifications must also bear a reasonable relationship to a proper governmental purpose and treat all persons within legitimate classifications similarly. Gibson v. West Virginia Dept. of Highways, 406 S.E. 2d 440 at 445 (W.Va. 1991). Stated another way, judicial inquiry under the equal protection clause (of the 14th Amendment) does not end with showing equal application among members of a class defined by the

legislature; the courts must reach and determine the question of whether the classifications drawn in the statute are *reasonable and rational in light of its* purpose. Carrington v. Nash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed. 2d 675 (1965); McGloughlin v. Florida, 379 U.S. 184 85 S.Ct. 283, 13 L.Ed 2d 222 (1964). As the following discussion will demonstrate, the classifications contained in the Ordinance are arbitrary and devoid of any apparent rationale.

A cursory review of the Ordinance (see. eg., A 107) reveals five classifications of fire service "users". [9]. In reality there are only three. No fee distinction is made in the Ordinances between (a) "Residential Unit Structure" and "Dual Residential Structure" and (b) "Multiple Family Residential Unit Structure". The classifications can thus be summarized as follows:

1. Residential Unit and Dual Unit Structures;
2. Multiple Family Residential Unit and Non-Residential Unit Structures;
3. Non-Residential Tenant Unit Structure.

(Depo. P. Shives at pp. 68-73, RR Vol. I, p. 82-87; Hearing Transcripts, 5-18-95, p. 38; RR Vol. IV, p. 38).

Because there are only three rate schedules, the creation of five classes of "users" in the first instance was arbitrary (RR Vol. IV, p. 38). These three "classes" and the classification of "residential" vs. "non-residential" generally, are neither reasonable nor rational in light of their purposes.

The City was asked in every possible way to provide Petitioners with some basis for the creation of the classifications in the Ordinance (Plaintiff's Answer to Defendants First Interrogatories at No.4, p 5; RR Vol. I p. 211; Plaintiffs' Answer to Defendants' Second

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[9] Residential unit structure, dual residential unit structure, multiple family residential unit structure, non-residential unit structure and non-residential tenant unit structure.

Interrogatories at No.1, p 1-2; RR Vol. I p. 226-227; and Depo. P. Shives, pp. 43, 82, 85, 88, 94-96, 101-102, RR Vol. I, pp. 57, 96, 99, 102, 108-110, 115-116). Under the evidentiary record of this case, not a single document, study, minute, record, communication or reason of any kind has been provided to the Petitioners in support of or which could justify a substantial distinction between any residential and non-residential structure or classification. Instead, the classifications are based on "discussions and conference sessions" where "no written record... and no minutes were taken" because they were not "official meetings" and "where there are no written documents concerning these meetings", and where no written study or analysis was done to assist Council in making this determination. (Plaintiff's Answer to Second Interrogatories at p. 1-2, RR Vol. I, pp. 226-227). Based thereon, it was agreed that "users of the service would be classified as residential users and non-residential users".

Petitioners however, are not relying on any conclusory allegations regarding past decisions. The City Manager, Paul Shives testified at his deposition that no study has ever been done comparing the cost of fire protection on residential versus non-residential structures.
(Depo. P. Shives, Tr. 94-95, RR Vol. I, pp. 108-109).

These "transparent classifications distinguishing between commercial and non-commercial enterprises (are) arbitrary and devoid of any apparent rationale". State, Ex. Rel. Miller vs. McDonald, 260 Ind. 565, 297 N.E. 2d 826, (1973), Cert. Den. 414, U.S. 414 U.S. 1158, 94, S.Ct. 917, 39 L.Ed. 111 (1974). See also, Clay County Citizens For Fair Taxation vs. Clay County Commission, 452 Se2d 724 (W.Va, 1995).

Because the classifications are not grounded upon any real differences and are thus arbitrary, the Ordinance per se discriminates against all class members in each and every classification.

Nonetheless, a pattern has emerged under the Ordinance where commercial owners and tenants have been singled out to bear the brunt of the costs of fire protection without any basis for doing so. First, the total fees where an owner of a non-residential structure leases space to a (third party) tenant are 150% of the total fees if an owner runs his own business (Depo. P. Shives at Tr. 80-82, RR Vol. I, pp. 94-96; RR Vol. II, pp. 270 et seq. and RR Vol. II, pp. 287, et seq). Second, the fees are consistently categorically higher to non-residential owners than to residential owners, and this premise is stated to be the legislative intent of the Ordinance. Third, the fees for "personal property" are included in all categories except those to non-residential tenants. The total fees to non-residential owners/ lessors are twice the total fees to residential owners/lessors. (Even if the "personal property" fees were not included as aforesaid, then only non-residential tenants would be required to pay a "personal property" fee). Fourth, only non-residential tenants are billed by the City for fire service fees (Depo. P. Shives, Tr. 107-108, RR Vol. I, pp. 121-122). In conclusion the City, through a clever manipulation of express fees and silent "personal property fees" is charging non-residential landlords twice the fee charged to residential landlords. The foregoing arguments demonstrate a pattern and policy on the part of the City of intentional and invidious discrimination against owners of commercial real property and their tenants.

VI. CONCLUSION

Petitioners wish to stress the fact that they are not adverse to reasonable and fair government taxation. In conclusion, Defendants' adopt by reference the profound concurring opinion by Justice McGraw in City of Fairmont vs. Pitrolo Pontiac-Cadillac, 308 S.E.2d 527 (W.Va. 1983). The following excerpt therefrom, however, cited by the Court in U.S. vs. Huntington, supra (A 95-96) is worth repeating:

"After diverting tax revenues into these new areas of governmental endeavor, government began charging its citizenry "fees" for the provision of traditional essential services. By attempting to call a spade a shovel, political leaders, pressed by the demands of diverse constituency groups within local governmental entities, have sought to avoid the will of the people that the growth of government be limited. Ironically, it was many of these same political leaders who helped spur passage of the Property Tax Limitation (Amendment) of 1982, W. Va. Const. Art. X, §1b, which further constrained the ability of local governments in West Virginia to raise revenue. To wiggle off the sharp hook which they have fashioned for themselves, these political leaders now turn to the Court and ask it to label a 'tax' a 'fee'. Engaging in this type of subterfuge and sophistry is nothing new to West Virginia where avoiding limitations on revenue-raising ability is concerned."

Respectfully submitted,

Thomas G. Eddy, Esquire
Counsel for Petitioners

Supreme Court, U.S.
FILED

No. 98-1752

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OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1998

**GRANDEOTTO, INC., a corporation;
BERNARD J. and KATHY A. FOLIO;
MID-CITY LAND CO.;
BERNARD J. FOLIO, d/b/a Highrise Associates;
KATHRYN FOLIO; JOSEPH FOLIO ,**

Petitioners,

v.

CITY OF CLARKSBURG, a municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WEST VIRGINIA

Appendix to Petition for Writ of Certiorari

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1998 Term

No. 25143

CITY OF CLARKSBURG,
A MUNICIPAL CORPORATION,
Appellee

v.

GRANDEOTTO, INC., A CORPORATION;
BERNARD J. AND KATHY A. FOLIO;
MID-CITY LAND CO.;
BERNARD J. FOLIO D/B/A HIGHRISE ASSOCIATES;
KATHRYN FOLIO; JOSEPH FOLIO,
Appellants

Appeal from the Circuit Court of Harrison County
Honorable Thomas A. Bedell, Judge
Civil Action Nos. 93-C-609-2, 93-C-648-2, 93-C-706-2,
93-C-707-2, 94-C-184-1 & 94-C-196-2

AFFIRMED

AND

No. 25401

THE CITY OF HUNTINGTON,
A WEST VIRGINIA CORPORATION,
Appellee

v.

MOST REVEREND BERNARD W. SCHMITT,
BISHOP OF THE ROMAN CATHOLIC DIOCESE
OF WHEELING-CHARLESTON,
Appellant

Appeal from the Circuit Court of Cabell County
Honorable David M. Pancake, Judge
Civil Action No. 97-C-320

AFFIRMED

AND

No. 25402

WHEELING COLLEGE, INC.,
A WEST VIRGINIA CORPORATION, AND
THE MOST REVEREND BERNARD W. SCHMITT,
BISHOP OF THE DIOCESE OF
WHEELING-CHARLESTON,
Appellants

v.

THE CITY OF WHEELING,
A MUNICIPAL CORPORATION,
Appellee

AND

THE CITY OF WHEELING,
A MUNICIPAL CORPORATION,
Appellee

v.

THE OHIO COUNTY BOARD OF EDUCATION,
Appellant

Appeal from the Circuit Court of Ohio County
Honorable Ronald E. Wilson, Judge
Civil Action Nos. 95-C-72W & 96-C-11
AFFIRMED

Submitted: November 10, 1998
Filed: December 15, 1998
Entered: December 15, 1998

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Amici Brief

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Jendonnae Houdyschell, Esq.
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City of Weirton

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City of Beckley

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City of Charleston
John Feuchtenberger, Esq.
City of Bluefield

Amy Haynie, Esq.
City of South Charleston

Amicus Brief

James W. Withrow, Esq.
West Virginia Municipal League, Inc.

The Opinion of the Court was delivered PER CURIAM.

JUSTICE McCUSKEY dissents and reserves the right to file a dissenting Opinion.
JUSTICE MAYNARD dissents and reserves the right to file a dissenting Opinion.
JUSTICE McGRAW did not participate in the decision of this case.

SYLLABUS BY THE COURT

1. "An ordinance which imposes a municipal service fee pursuant to *W. Va. Code*, 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W. Va. Const.* Art. X, § 1." Syllabus

Point 6, *City of Huntington v. Bacon,* 196 W.Va. 457, 473 S.E.2d 743 (1996).

2. "Pursuant to *W. Va. Code,* 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality for fire and flood protection services pursuant to *W.Va. Code,* 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order." Syllabus Point 8, *City of Huntington v. Bacon,* 196 W.Va. 457, 473 S.E.2d 743 (1996).

Per Curiam:

The three cases before us were consolidated for argument and opinion. In the first case, Grandeotto, Inc., Kathy A. Folio, Mid-City Land Co., Bernard J. Folio, d/b/a Highrise Associates, Kathryn V. Folio, and Joseph A. Folio (the Grandeottos) appeal the July 24, 1997 order of the Circuit Court of Harrison County, West Virginia, which granted summary judgment to the City of Clarksburg and ordered the Grandeottos to pay the fire service protection fee. In the second case, Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston (the Bishop or Diocese), appeals the June 12, 1998 order of the Circuit Court of Cabell County, West Virginia, which granted summary judgment to the City of Huntington and ordered the Diocese to pay the municipal service fee. In the third case, Wheeling College, Inc. (now Wheeling Jesuit University) and Bishop Schmitt (the University and the Diocese) as well as the Ohio County Board of Education (Board) appeal the August 19, 1998 order of the Circuit Court of Ohio County, West Virginia, which granted partial summary judgment to the City of Wheeling in that the court found the University, Diocese, and Board must pay the fire service fee. Other issues were reserved for further

consideration.[1] That order was determined by the court to be a final, appealable order by order entered August 28, 1998.

I.

The first case involves individual landowners who own property within the City of Clarksburg. The City enacted and amended ordinances imposing fire protection and waste collection service fees under the authority of W.Va. Code § 8-13-13 (1971).[2] Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance: Provided, That any sewerage and sewage disposal service and any service incident to the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter shall be subject to the provisions of chapter twenty-four [§ 24-1-1 et seq.], of this code. This Code section grants local

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[1] The court reserved three issues for further consideration and action: the amounts owed by the University, the Diocese, and the Board; whether a binding settlement existed between the City, the University and Diocese; and whether delinquent fire service fees were owed by the Board prior to this Court's decision in *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996).

[2] W.Va. Code § 8-13-13 (1971) states in relevant part:

governments authority to enact ordinances for the imposition of reasonable fees upon the users of municipal services to defray certain municipal operating costs, in this case, the costs of fire protection. Ordinance § 957.11 specifies that a flat fee is charged for fire protection services to owners of residential property; owners of nonresidential unit structures and multiple-family residential structures are assessed according to square footage; nonresidential tenants must pay fifty percent of the amount per square foot that nonresidential owners must pay. The fee generates approximately $750,000 in revenue per year, which is used to defray the costs of operating the Clarksburg Fire Department. The fee comprises approximately forty-two percent of the fire department's budget of $1,809,000.

The individual landowners refused to pay the fire protection fees assessed against their various properties. The City of Clarksburg filed actions in circuit court in an effort to collect the unpaid fire service fees. The actions were consolidated by the court. After extensive discovery, the parties made a series of dispositive motions, which were converted by the court to Rule 56 motions for summary judgment. On July 24, 1997, the court granted the City's motion for summary judgment and denied the landowners' motion for summary judgment. The court determined the amount owed by each landowner and ordered that the fees be paid. It is from this order that the landowners appeal.

II.

In the second case, the City of Huntington brought an action against the Diocese to collect unpaid municipal service fees on two buildings located within the City. The purpose of the fee is to defray the costs of providing fire and flood protection. Pursuant to W.Va. Code § 8-13-13, the City of Huntington enacted Ordinance § 773.03 and began charging a municipal service fee in July 1990. The fee is assessed as a flat fee on each lot with an additional amount

assessed for each square foot of floor space in each building erected on each lot. The fee generates approximately $4,200,000 in revenue per year, while the cost of providing fire and flood protection is approximately $6,900,000 per year. Therefore, the City must pay an additional amount of approximately $2,700,000 annually to cover the cost of these services.

In conformity with the Fourth Circuit's decision in *United States v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct 1048, 127 L.Ed.2d 371 (1994),[3] the City does not collect the service fee from the federal government. Nor does the City bill itself for the service fee.

The City attempted to collect unpaid fees from the Bishop or Diocese for the two schools located in the City by filing an action in circuit court in 1997. Both parties moved for summary judgment. On July 21, 1997, the court granted the Bishop partial summary judgment, stating that the April 1992 through June 1994 fee actually constituted a tax which could not be levied against the Bishop. The same order granted partial summary judgment to the City, stating that "the municipal service fee for the period of July 1, 1994 through April 24, 1997 constitutes a fee, not a tax, and can be levied against the Defendant." By order entered June 4, 1998, the court found the Diocese was liable to the City for payment of the service fee. The exact amount owed was determined by order of court entered on June 12, 1998. It is from this order the Diocese appeals.

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[3] *United States v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1048, 127 L.Ed.2d 371 (1994), holds that the City is barred by the Supremacy Clause of the U.S. Constitution from collecting the service fee from the federal government.

III.

The third appeal involves two cases which were consolidated by the circuit court. Pursuant to W.Va. Code § 8-13-13 (1971), the City of Wheeling enacted Ordinance § 793.03, the purpose of which is to defray the costs of providing fire protection services to the City of Wheeling. Owners of residential unit structures are assessed a flat annual fee; owners of nonresidential unit structures are assessed a rate based on the square footage of the building; tenants of nonresidential and residential unit structures are assessed a flat fee; owners or lessees of vehicles are assessed a flat fee per vehicle. The ordinance exempts no one from paying the fire service fee; however, the City does not issue bills to itself for buildings and vehicles titled in the name of the City.

The University and Diocese filed an action against the City seeking a declaration that the fire service fee is actually a tax from which they are exempt pursuant to W.Va. Code § 11-3-9 (1998).[4] The City instituted a collection action against the Board. The Board posited essentially the same defenses to the fire service fee that the University and Diocese raised in their action. The court, therefore, consolidated the two actions. Following discovery, the parties filed cross-motions for summary judgment. The

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[4] W.Va. Code § 11-3-9 (1998) states in pertinent part:

(a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:

(1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;

(5) Property used exclusively for divine worship;

(9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture[.]

circuit court entered an order on August 19,1998 finding that "the Defendants are authorized to pay the fire service fee imposed by the City of Wheeling[.]" Having reserved certain issues for later consideration, the court entered an order on August 28, 1998, finding that the prior order of the court "constitutes a final, appealable Order." It is from this order the University, Diocese, and Board appeal.

IV.

On appeal, the various appellants offer various assignments of error. The Grandeottos argue the Clarksburg fee is a tax which violates the Tax Limitation Amendment,[5] due process, and equal protection. The Diocese, University, and the Board argue they do not have to pay because the federal government is immune pursuant to *United States v. City of Huntington, W.Va.*, *supra*, and W.Va. Code § 11-3-9 (1998)[6] exempts them from taxation along with the federal government. All parties request that we revisit our prior decision, *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996). The question we must answer is whether the circuit courts erred in determining the appellants must pay the municipal and fire service fees which were assessed against them.

In *Bacon*, the City of Huntington filed suit against the Bacons, who were owners of buildings located in the City. The Bacons refused to pay the municipal service fee. They maintained the fee was a tax which violated the Tax Limitation Amendment. The circuit court disagreed and concluded the fee was a user fee which was properly imposed pursuant to W.Va. Code § 8-13-13. This Court affirmed the circuit court.

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[5] W.Va. Const. art. X, § 1.

[6] *See supra* note 4.

The City also brought a declaratory judgment action against the Cabell County Board of Education, seeking to determine whether the fee could be recovered from the Board in light of *United States v. City of Huntington, W.Va., supra*. The question was certified to this Court, where it was determined that county boards of education are authorized to pay municipal service fees.

We note that the federal case, *United States v. City of Huntington, W.Va., supra,* was written prior to this Court's *Bacon* decision. The *Bacon* Court determined that municipal service fees are indeed fees and not taxes. The Bacons and the Board of Education were found to be subject to the fee even though the federal government was not obligated to pay pursuant to the Supremacy Clause, Article VI, Clause 2 of the U.S.Constitution. By way of explanation, this Court stated:

> [W]here a federal entity is involved, the federal courts may determine whether a particular funding mechanism employed by a state or its political subdivision is, in fact, a tax[.]
>
> It follows, therefore, that a state is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the Constitution of the United States (citation omitted).

Bacon at 464-65, 473 S.E.2d at 750-51. The Fourth Circuit's holding did not apply to the Bacons or the Board of Education. The same is true for the appellants in the case *sub judice*.

We reiterate this Court's previous holding which states:

> An ordinance which imposes a municipal service fee pursuant to *W. Va.Code*, 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W. Va. Const.* Art. X, § 1.

Syllabus Point 6, *Bacon, supra.*

We also reiterate that:

> Pursuant to *W. Va.Code*, 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality for fire and flood protection services pursuant to *W.Va.Code*, 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order.

Syllabus Point 8, *Bacon, supra.*

The circuit courts did not err in granting summary judgment in favor of the Cities of Clarksburg, Huntington, and Wheeling. Accordingly, we affirm the respective judgments of the Circuit Court of Harrison County, the Circuit Court of Cabell County, and the Circuit Court of Ohio County.

Affirmed.

No. 25143 - City of Clarksburg, a municipal corporation v. Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio dba Highrise Associates; Kathryn Folio; Joseph Folio.

No. 25401 - The City of Huntington, a West Virginia municipal corporation v. Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston.

No. 25402 - Wheeling College, Inc., a West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston v. The City of Wheeling, a municipal corporation AND The City of Wheeling, a municipal corporation v. The Ohio County Board of Education.

Entered: December 15, 1996

Maynard, Justice, dissenting:

I dissent because I believe the Catholic Church, as well as all churches, and all public and other schools are exempt under W.Va. Code § 11-3-9 (1998) from paying this wolfish tax which is cloaked in the garb of a sheepish fee. See footnote[1]

First, I note the great importance of the municipal taxes at issue here. Government performs no more important service than providing its citizens with fire protection. This is a very basic and historical government service, and one

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[1] I dissent specifically to this Court's decisions in case numbers 25401 and 25402 involving the Roman Catholic Diocese, schools and boards of education. I believe there is no reason the appellants in case number 25143 should not pay the "fee" at issue since, unlike churches and schools, they are not exempted under W.Va. Code § 11-3-9.

that private citizens are unable to undertake for themselves. In order to provide this service, local governments must staff fire departments with trained personnel and provide these personnel with modern firefighting equipment. This requires a lot of money. This money is generated through the levying of taxes on those who reap the benefits of effective fire protection. This is at it should be.

However, Article X, § 1 of the Constitution of West Virginia provides, in part, that "property used for educational, literary, scientific, religious or charitable purposes . . . may by law be exempted from taxation." This constitutional authorization is codified by the Legislature in W.Va. Code § 11-3-9 (1998). Specifically, W.Va. Code § 11-3-9 provides, in pertinent part:

> (a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:
>
> (1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;
>
> (5) Property used exclusively for divine worship;
>
> (9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture[.]

This code section derives, at least in part, from the recognition that those enumerated institutions which are supported by the public, either through taxation or private gifts, and that exist for the educational, literary, scientific, religious, or charitable enrichment of society should fulfill their missions absent the burden of taxation. This is altogether fitting and proper. The majority, however, resorts to semantic sophistry in order to avoid the unambiguous

language of W.Va. Code § 11-3-9. In short, the majority holds that a tax is not a tax when it is called a fee.

In holding that if a tax is called a "fee" it can be levied against those institutions lawfully exempt from taxation, the Court opens wide the door for unlimited government collection of so-called fees. Government's penchant for taxation depends on its ability to devise increasingly creative and expensive schemes to justify the need for the levying of additional taxes. It will not be long now before legitimate "fees" for fire and flood protection are joined by more questionable "fees" such as recreation fees, clean air fees, pollution fees, beautification fees, road paving fees, garbage fees, cultural event fees, parking fees, sporting event fees, and regatta fees. Anyone doubting that such a proliferation of government "fees" could and will occur need only look at the history of taxation in the United States in the twentieth century to be convinced. Also, while the above-mentioned "fees" may be collected to pay for desirable things, these "fees" should be labeled what they really are: taxes.

"The power to tax involves the power to destroy," noted Chief Justice John Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819). This is also true of the power to collect "fees." No matter what you call it, the money taken from the Catholic Diocese and the schools involved in this case means that there is less money in the operating budgets of these institutions. This is money that would otherwise be spent on teachers' salaries, new textbooks, equipment, or building improvements. In his oral argument before this Court, the lawyer for the Ohio County Board of Education and Wheeling Jesuit University contended that the board of education will be forced to pay almost one million dollars a year out of the school budget as a result of this "fee." This "fee," therefore, is really a tax paid by the school children in Ohio County to the detriment of their education. Regardless of whether the collection of the money is called a tax or a fee, it has the same effect on the

appellants' finances. Shakespeare wrote, "That which we call a rose by any other name would smell as sweet. "See footnote[2] The Bard's words are equally true regarding the noxious odor of taxes. That which we call a tax by any other name smells just as bad.

In sum, I agree with the United States Court of Appeals, Fourth Circuit in United States v. City of Huntington, West Virginia in its assessment that the Huntington user fee "is a thinly disguised tax." 999 F.2d 71, 74. I believe this is true of all the fees involved here. Further, the Court of Appeals held that the federal government is immune from paying these exact same fees. Therefore, I would hold that if the federal government is immune from paying a "fee," the other entities listed in W.Va. Code § 11-3-9 are also. To say otherwise is a clear denial of equal protection to the churches and schools. Sadly, their recourse now must be to the federal courts to set things right. Accordingly, I would find that W.Va. Code § 11-3-9 exempts the Diocese and the schools from paying the "fees" at issue. This is clearly one instance in which the Diocese should not be bound to render unto Caesar. By holding to the contrary, the majority opinion opens the door to additional taxes and an increasing burden on those institutions that are, under our Constitution and by law, exempt from such taxation.

I am authorized to state that Justice McCuskey joins in this dissent.

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[2] Romeo and Juliet. Act II, Sc. 2, Line 43.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of February, 1999, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

AND

The City of Huntington, a West Virginia municipal corporation, Plaintiff Below, Appellee

vs.) No. 25401

Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Defendant Below, Appellant

AND

Wheeling College, Inc., West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, Plaintiffs Below, Appellants

vs.) No. 25402

The City of Wheeling, a municipal corporation, Defendant Below, Appellee

AND

The City of Wheeling, a municipal corporation, Plaintiff Below, Appellee

vs.

The Ohio County Board of Education, Defendant Below, Appellant

On a former day, to-wit, February 16, 1999, came the appellants, Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio and Joseph Folio, by Eddy & Osterman, and Thomas G. Eddy, and McNeer, Highlan, Mcmunn & Varner, and J. Cecil Jarvis, their attorneys, and presented to the Court their motion in writing for a stay of the Court's mandated pending the filing of a writ of certiorari with the Supreme Court of the United States.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion to stay the Court's mandate. Justice Maynard would grant.

A True Copy

Attest: Deborah Z. McHenry
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 4th day of February, 1999, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

AND

The City of Huntington, a West Virginia municipal corporation, Plaintiff Below, Appellee

vs.) No. 25401

Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Defendant Below, Appellant

AND

Wheeling College, Inc., West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, Plaintiffs Below, Appellants

vs.) No. 25402

The City of Wheeling, a municipal corporation, Defendant Below, Appellee

AND

The City of Wheeling, a municipal corporation, Plaintiff Below, Appellee

vs.

The Ohio County Board of Education, Defendant Below, Appellant

The Court, having maturely considered the records, and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is no error in the rulings of the Circuit Court of Cabell County, rendered on the 12th day of June, 1998, in No. 25401; in the rulings of the Circuit Court of Harrison County, rendered on the 24th day of july, 1997, in No. 25143; or in the rulings of the Circuit Court of Ohio County, rendered on the 19th day of August, 1998, in No. 25402. It is therefor considered and ordered by the Court that said rulings be, and the same hereby are, affirmed; all of which is ordered to be certified to the Circuit Court of Cabell County, to the Circuit Court of Harrison County and to the Circuit Court of Ohio County.

The syllabus of points adjudicated, prefixed to the written opinion Per Curiam, was concurred in by Chief Justice Davis and Justices Workman and Starcher. Justices Maynard and McCuskey dissent and reserve the right to file dissenting opinions.

A True Copy

Attest: Deborah Z. McHenry
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of October, 1998, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

AND

The City of Huntington, a West Virginia municipal corporation, Plaintiff Below, Appellee

vs.) No. 25401

Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Defendant Below, Appellant

AND

Wheeling College, Inc., West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, Plaintiffs Below, Appellants

vs.) No. 25402

The City of Wheeling, a municipal corporation, Defendant Below, Appellee

AND

The City of Wheeling, a municipal corporation, Plaintiff Below, Appellee

vs.

The Ohio County Board of Education, Defendant Below, Appellant

On a former day, to-wit, October 9, 1998, came the appellants in No. 25143, Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Company; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio, and Joseph Folio, by McNeer, Highland, McMunn & Varner, and J. Cecil Jarvis, and Eddy & Osterman, and Thomas G. Eddy, their attorneys, and also came the appellants in Nos. 25401 and 25402, Wheeling College, Inc., a West Virginia corporation, the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, and the Ohio County Board of Education, by Lewis, Friedberg, Glasser, Casey & Rollins, G. Nicholas Casey, Jr., Webster J. Arceneaux, III, and Sandra K. Henson; Thorp, Reed & Armstrong, Clifford B. Levine, Peter K. Blume, Stuart C. Gaul, Jr., and Cathy M. Armstrong; Bailey, Riley, Buch & Harman, John Preston Bailey and Harry L. Buch; Phillips, Gardill, Kaiser & Altmeyer, and James C. Gardill; and Schrader, Byrd, Companion & Gurley, and James F. Companion, their attorneys, and presented to the Court their joint motion in writing to consolidate the above-captioned proceedings for the reasons stated therein. Thereafter, on the 14th day of October, 1998, came the appellee in No. 25143, the City of Clarksburg, a municipal corporation, by Young, Morgan & Cann, and Gregory A. Morgan, its attorneys, and presented

to the Court its written response in opposition thereto. Finally, on the same day came the appellee in No. 25401, the City of Huntington, a municipal corporation, by Jendonnae L. Houdyschell, its attorney, and the appellee in No. 25402, the City of Wheeling, a municipal corporation, by Ronald M. Musser and Rosemary J. Humway-Warmuth, its attorneys, and presented to the Court their written joint response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion to consolidate. It is hereby ordered that the above-captioned cases, Nos. 25143, 25401 and 25402 be, and they hereby are, consolidated for purposes of oral argument, consideration and decision. Justices Workman and Starcher would refuse. It is further ordered that these cases be set on the Court's Argument Docket scheduled for Tuesday, the 10th day of November, 1998.

A True Copy

Attest: Deborah Z. McHenry
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of October, 1998, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

On a former day, to-wit, October 9, 1998, came Wheeling College, Inc., a West Virginia corporation, the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, and the Ohio County Board of Education, by Lewis, Friedberg, Glasser, Casey & Rollins, G. Nicholas Casey, Jr., Webster J. Arceneaux, III, and Sandra K. Henson; Thorp, Reed & Armstrong, Clifford B. Levine, Peter K. Blume, Stuart C. Gaul, Jr., and Cathy M. Armstrong; Bailey, Riley, Buch & Harman, John Preston Bailey and Harry L. Buch; Phillips, Gardill, Kaiser & Altmeyer, and James C. Gardill; and Schrader, Byrd, Companion & Gurley, and James F. Companion, their attorneys, and presented to the Court their motion in writing for leave to intervene in the above-captioned proceeding for the purpose of joining in a motion to consolidate the above-captioned proceeding with The City of Huntington, etc. vs. Most Reverend Bernard W. Schmitt, et al., No. 25401 and Wheeling College, Inc., et al. vs. The City of Wheeling/The City of Wheeling vs. the Ohio County Board of Education, No. 25402. Thereafter, on the 14th day of October, 1998,

came the appellee, the City of Clarksburg, a municipal corporation, by Young, Morgan & Cann, and Gregory A. Morgan, its attorneys, and presented to the Court its written response in opposition thereto. Finally, on the same day came the appellee in No. 25401, the City of Huntington, a municipal corporation, by Jendonnae L. Houdyschell, its attorney, and the appellee in No. 25402, the City of Wheeling, a municipal corporation, by Ronald M. Musser and Rosemary J. Humway-Warmuth, its attorneys, and presented to the Court their written joint response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion to intervene. Justices Workman and Starcher would refuse.

A True Copy

Attest: Deborah Z. McHenry
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of May, 1998, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

On a former day, to-wit, December 9, 1997, came the petitioners, Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Company; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio, and Joseph Folio, by McNeer, Highland, McMunn & Varner, and J. Cecil Jarvis, and Eddy & Osterman, and Thomas G. Eddy, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Harrison County, rendered on the 24th day of July, 1997, with the record accompanying the petition. Thereafter, on the 22nd day of December, 1997, came the respondent, the City of Clarksburg, a municipal corporation, by Young, Morgan & Cann, and Gregory A. Morgan, its attorneys, and presented to the Court its written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal. Chief Justice Davis would refuse

A True Copy

Attest: Rodney Teal
Clerk, Supreme Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR.
UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3538
TELEPHONE (804) 771-2213

Entered: February 20, 1998

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Clarksburg, WV 26301

Re: 97-1628 Folio v. City of Clarksburg
CA-96-180

Dear Counsel:

Enclosed is a copy of an order filed today in this case.

Yours truly,

Patricia S. Connor
Clerk

/s/ Deborah S. Daniel
Deputy Clerk

Enclosure(s)

cc: Wally Edgell

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: FEBRUARY 20, 1998
ENTERED: FEBRUARY 20, 1998

No. 97-1628
CA-96-180

BERNARD J. FOLIO; MID-CITY LAND COMPANY; BERNARD J. FOLIO, d/b/a High Rise Associates, Incorporated; GRANDEOTTO, INCORPORATED; KATHRYN FOLIO; JOSEPH A. FOLIO
Plaintiffs - Appellants

v.

THE CITY OF CLARKSBURG, WEST VIRGINIA, a West Virginia municipal corporation; FRANK FERRARI, Director of Finance for the City of Clarksburg
Defendants - Appellees

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the peition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor
CLERK

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1628

BERNARD J. FOLIO; MID-CITY LAND COMPANY; BERNARD J. FOLIO, d/b/a High Rise Associates, Incorporated; GRANDEOTTO, INCORPORATED; KATHRYN FOLIO; JOSEPH A. FOLIO,

Plaintiffs-Appellants,

v.

THE CITY OF CLARKSBURG, WEST VIRGINIA, a West Virginia municipal corporation; FRANK FERRARI, Director of Finance for the City of Clarksburg,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. William M. Kidd, Senior District Judge.
(CA-96-180)

Argued: October 27, 1997
Decided: January 26, 1998
Entered: January 26, 1998

Before LUTTIG, Circuit Judge, CAMPBELL, Senior Circuit Judge of the United States Court of Appeals for the First Circuit, sitting by designation, and TRAXLER, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Traxler wrote the opinion, in which Judge Luttig and Senior Judge Campbell joined.

COUNSEL

ARGUED: Thomas G. Eddy, EDDY & OSTERMAN, Pittsburgh, Pennsylvania, for Appellants. Gregory Alden Morgan, YOUNG, MORGAN & CANN, Clarksburg, West Virginia, for Appellees. **ON BRIEF:** J. Cecil Jarvis, MCNEER, HIGHLAND & MCMUNN, Clarksburg, West Virginia, for Appellants.

OPINION

TRAXLER, District Judge:

Appellants brought this action pursuant to 28 U.S.C.A. § 2201(a) (West 1994) and 42 U.S.C.A. § 1983 (West Supp. 1997) against the City of Clarksburg, West Virginia ("the City") and Frank Ferrari, Director of Finance for Clarksburg, seeking a judgment declaring unconstitutional an ordinance that imposes a fee for municipal services and an injunction against the future collection of the fee. Appellants challenge the ruling of the district court that the Tax Injunction Act precludes federal subject matter jurisdiction. See 28 U.S.C.A. § 1341 (West 1993). We affirm.

I.

West Virginia law bestows upon a municipality which furnishes essential municipal services such as police or fire protection "plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the

users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance." W. Va. Code § 8-13-13 (1990). Enabled by this statute, the City enacted an ordinance imposing fees upon property owners and occupiers within the City for fire protection services. See Clarksburg, W. Va. Ordinances part 9, ch. 5, §§ 957.01, 957.11 (1983) (as amended). The amount of the fee is tethered to the classification of each property owner as "residential" or "non residential," requiring residential owners to pay a flat fee and non-residential owners to pay a fee determined by reference to the square footage of their property. See id. at § 957.11(a).[1] Appellants own real property within the City's corporate boundaries and are classified as nonresidential property owners. See id. at § 957.02(d).

In 1993 and 1994, the City commenced several actions against appellants, which were later consolidated into a single lawsuit in the Circuit Court of Harrison County, West Virginia, to collect unpaid fire protection service fees previously assessed against appellants. The parties filed cross-motions for summary judgment. Appellants argued to the state tribunal that the imposition of the fees constituted equal protection and due process violations under both the state and federal constitutions. The state court acknowledged appellants' assertion that the fire protection service fee "violates the Due Process and Equal Protection Clauses of the United States ... Constitution[ ]," see City of Clarksburg v. Grandeotto, Inc., et al., Circuit Court, Harrison County, West Virginia, No. 93-C-609-2 at 10 (July 24, 1997) ("Memorandum of Decision"), but granted summary judgment in favor of the City and ordered appellants to pay their outstanding fire protection service fees. The West

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[1] An exception to this assessment scheme is made for owners of multiple family residential units who, like nonresidential property owners, must pay based upon square footage. See Clarksburg, W. Va. Ordinances part 9, ch. 5 at § 957.11(a).

Virginia court expressly determined that appellants "failed to meet their burden of proving that the classifications selected by the City are arbitrary and unreasonable" or that "they were treated differently from other property owners in their same classifications." Id. at 13.

While the state court action was pending, appellants initiated this action in federal district court against the City. Appellants sought a declaratory judgment that the ordinance, as it relates to fire protection services, violates the due process and equal protection clauses of the Fourteenth Amendment, and requested injunctive relief against the City to prevent future collection or assessment of the fees. Concluding that the Tax Injunction Act barred it "from enjoining, suspending or restraining the assessment, levy or collection of the [o]rdinance" or "issu[ing] a declaratory judgment holding the [o]rdinance unconstitutional," the district court granted the City's motion to dismiss for lack of subject matter jurisdiction. J.A. 24. Appellants urged the district court to find the Tax Injunction Act inapplicable because West Virginia state law provides no adequate or certain remedy to challenge the ordinance. The district court rejected this argument and noted that the only uncertainty was whether appellants would prevail on the merits of their claim in state court. See id. at 23. Additionally, the district court found, contrary to appellants' insistence, that the fire service protection fee is a tax subject to the Tax Injunction Act because the ordinance raised revenue for the public benefit and was not "in the nature of a privilege fee." See id. (internal quotation marks omitted).

II.

The Tax Injunction Act provides in its totality that"[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C.A. § 1341. This statutory

provision is a jurisdictional bar that is not subject to waiver, and the federal courts are duty-bound to investigate the application of the Tax Injunction Act regardless of whether the parties raise it as an issue. See Collins Holding Corp. v. Jasper County, South Carolina, 123 F.3d 797, 799 & n.1 (4th Cir. 1997). The Tax Injunction Act is undergirded by a policy of restraint in the federal courts, which, save limited exceptions, are "under an equitable duty to refrain from interfering with a State's collection of its revenue" in light of "the imperative need of a State to administer its own fiscal operations." Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976). Essentially, "the Act ... [is] first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 522 (1981). It is settled that the broad prophylactic terms of the Tax Injunction Act apply to declaratory as well as injunctive relief, see California v. Grace Brethren Church, 457 U.S. 393, 411 (1982), and that local taxes fall within the ambit of the statute, see Collins Holding Corp., 123 F.3d at 799 n.2. Moreover, the Tax Injunction Act applies to actions where, as here, a taxpayer seeks injunctive or declaratory relief under § 1983. See Rosewell, 450 U.S. 503. Only when state law provides no "plain, speedy and efficient" remedy may a federal district court order declaratory or injunctive relief that trenches upon "the assessment, levy or collection" of any state or local tax. See Grace Brethren Church, 457 U.S. at 411; see also Strescon Indus., Inc. v. Cohen, 664 F.2d 929, 931 (4th Cir. 1981) (explaining that "[t]he only exception contemplated by Congress relates to State remedies which are not plain, speedy, or efficient").

Mindful of these principles, we turn to address appellants' contention that the district court erroneously dismissed their action for lack of subject matter jurisdiction, applying a de novo standard of review. See Tillman v. Resolution Trust Corp., 37 F.3d 1032, 1034 (4th Cir. 1994). Appellants advance a two-fold argument. First, they maintain

that the "plain, speedy and efficient" exception applies here, allowing the district court to exercise jurisdiction over their action for declaratory and injunctive relief against the City. Second, they contend that the district court was not prohibited from entertaining their suit because the City's ordinance does not impose a "tax" within the meaning of the Tax Injunction Act. For the reasons set forth below, we find both contentions meritless.

A.

"On its face, the `plain, speedy and efficient remedy' exception appears to require a state-court remedy that meets certain minimal procedural criteria." Rosewell, 450 U.S. at 512 (emphasis in original). The essential question is whether the state remedy "provides the taxpayer with a `full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." Id. at 514. Stated differently, the taxpayer is entitled to a meaningful opportunity to assert federal constitutional challenges to the tax in state court. See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39 (1990). Thus, a real or perceived defect in the substantive remedy afforded a taxpayer under state law does not clothe the district court with jurisdiction to hear appellants' claims. See Strescon Industries, 664 F.2d at 931 (observing that where "otherwise adequate [s]tate procedures" exist, "an asserted substantive defect in the [s]tate remedy, even if found to exist, is an insufficient basis upon which [f]ederal jurisdiction may be grounded").

In addition to meeting minimal procedural safeguards, the state remedy must be certain -- state remedies that are merely speculative will not divest the federal courts of jurisdiction to entertain a state taxpayer's claim. See Franchise Tax Bd. v. Alcan Aluminum, Ltd., 493 U.S. 331, 340 (1990); Hillsborough v. Cromwell , 326 U.S. 620, 625-26 (1946). However, the "certainty" that is required is

procedural in nature; the Tax Injunction Act does not guarantee that the substantive relief sought by the taxpayer be certain or even likely. See Rosewell, 450 U.S. at 512-15; see also Cities Serv. Gas Co. v. Oklahoma Tax Comm'n, 656 F.2d 584, 586-87 (10th Cir. 1981) (explaining that "the likelihood of plaintiff's success in the state court is not a factor to be considered when determining whether the jurisdictional prohibition of § 1341 applies"). In examining whether state law provides a full opportunity for the presentation of federal challenges, courts must "be faithful to the congressional intent `to limit drastically' federal-court interference with state tax systems, [and] construe narrowly the `plain, speedy and efficient' exception to the Tax Injunction Act." Grace Brethren Church, 457 U.S. at 413.

Appellants argue that West Virginia law does not afford them a meaningful opportunity to raise their federal constitutional challenges to the City's ordinance in a state forum, asserting that every potential avenue of relief under state law is so tenuous and speculative that they do not have a plain, speedy and efficient remedy. We are not persuaded. Appellants have already raised numerous federal constitutional issues in defending against the City's state collection action which was pending at the time appellants initiated this action in federal court. They do not contend that they were precluded from pursuing these arguments in state court. In fact, just the opposite is true. Appellants admit that their "federal constitutional rights were indeed asserted" before the state tribunal. Brief of Appellants at 4. Rather, appellants insist that the West Virginia circuit court ignored these federal issues when it granted summary judgment to the City -- an assertion that is simply not sustained by the record. In its written order disposing of the cross-motions for summary judgment, the state court acknowledged appellants' federal constitutional arguments:

> Defendants have responded [to the City's lawsuits] by arguing that the fire protection

> service fee ordinance is invalid and unenforceable because it was not enacted in accordance with state law, it violates the Tax Limitation Amendment of the West Virginia Constitution, W. Va. Const. art. I, § 10, and it violates the Due Process and Equal Protection Clauses of the United States and West Virginia Constitutions because it is unreasonable.

See Memorandum of Decision at 10. The state court then granted summary judgment in favor of the City and ordered appellants to pay their outstanding fire protection service fees. In so doing, the court concluded that appellants "failed to meet their burden of proving that the classifications selected by the City are arbitrary and unreasonable" or that "they were treated differently from other property owners in their same classifications." Id. at 13. It is clear, contrary to what appellants would have us believe, that the West Virginia state court considered appellants' federal claims but simply rejected them. That being the case, the essence of appellants' argument is substantive, i.e., that they are entitled to a favorable disposition on the merits by the state court. Unfortunately for appellants, the "plain, speedy and efficient" requirement of the Tax Injunction Act does not guarantee appellants success in state court on the substantive merits of a claim. See Rosewell, 450 U.S. at 512-15.

Moreover, even had the City not initiated an action against appellants in state court, West Virginia's version of the Uniform Declaratory Judgment Act provides appellants with a "plain, speedy and efficient" remedy that would preclude federal jurisdiction here. See W. Va. Code § 55-13-1 (1990). This statute explicitly contemplates that parties who are aggrieved by a municipal ordinance may seek a declaratory judgment: "Any person ... whose rights, status or other legal relations are affected by a statute, [or] municipal ordinance ...may have determined any question of

construction or validity arising under the ... statute, [or] ordinance ... and obtain a declaration of rights, status or other legal relations thereunder." W. Va. Code § 55-13-2. Under West Virginia law, a declaratory judgment action is clearly an appropriate vehicle for challenging the constitutionality of a municipal ordinance, see, e.g., Kisner v. City of Fairmont, 272 S.E.2d 673, 675 (W. Va. 1980); Farley v. Graney , 119 S.E.2d 833, 839 (W. Va. 1960), and there is no procedural reason why this approach could not be employed to challenge the ordinance at issue here. Indeed, we are certainly not alone in concluding that the availability of declaratory relief under state law constitutes a "plain, speedy and efficient" remedy for purposes of the Tax Injunction Act and bars federal jurisdiction. See Tully, 429 U.S. at 74-75; see also Burris v. City of Little Rock, 941 F.2d 717, 720-21 (8th Cir. 1991) (concluding that an Arkansas declaratory judgment statute affords an adequate remedy under 28 U.S.C. § 1341); Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428, 431-32 (2d Cir. 1989) (finding that declaratory relief under New York law satisfied the requirements of 28 U.S.C. § 1341 and barred federal jurisdiction).

Appellants, however, assert that declaratory relief under West Virginia law is not an adequate state remedy because a state judge has some discretion in exercising jurisdiction over a declaratory judgment action. See Hall v. Hartley, 119 S.E.2d 759 (W. Va. 1961). Further, the argument goes, in light of unfavorable West Virginia precedent, no state court will opt to entertain such an action, rendering a declaratory judgment action an illusory remedy. Specifically, appellants rely upon City of Huntington v. Bacon, 473 S.E.2d 743 (W. Va. 1996), which held in part that a municipal fire protection fee -- substantially similar to the one at issue here -- was a fee as opposed to a "tax" under West Virginia law, and had been properly enacted by the City of Huntington, see id. at 753-54, 758. Appellants suggest that Bacon forecloses the possibility that a state court

would visit the issue of whether the City's fee structure is constitutional, and that any attempt
to obtain declaratory relief would be futile.

Appellants may be correct that, in light of Bacon or other West Virginia case law, they would meet with little success were they to seek a declaration in West Virginia state court that the ordinance runs afoul of the federal constitution. But, again, the Tax Injunction Act only guards against procedural defects, not substantive defects, see Trescon Indus., 664 F.2d at 931, and it does not allow appellants to invoke the jurisdiction of the federal courts merely because state precedent is unfriendly, see Carrier Corp. v. Perez , 677 F.2d 162, 166 (1st Cir. 1982). We conclude that the Uniform Declaratory Judgment Act, as adopted by West Virginia, see W. Va. Code § 55-13-2, is a "plain, speedy and efficient" remedy within the meaning of 28 U.S.C.A. § 1341.[2]

B.

Having concluded that appellants have a "plain, speedy and efficient" remedy under West Virginia law, we consider whether the fire protection service fee constitutes a tax for purposes of the Tax Injunction Act. We conclude that it does.

Appellants contend that the phrase "tax under [s]tate law," see 28 U.S.C.A. § 1341, requires this court to look to

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[2] In light of our determination that West Virginia affords appellants a sufficient opportunity to raise their federal challenges to the ordinance via a declaratory judgment action or in defense to an action to collect the fees, we need not decide whether the protest procedure that is set forth in the ordinance, see Clarksburg, W. Va. Ordinances at § 957.16, is a "plain, speedy and efficient" remedy in and of itself, cf. Tully, 429 U.S. at 74-77 (holding that New York declaratory judgment procedure provided adequate recourse to challenge the constitutionality of a state tax statute even though the statute contained an "exclusive" remedy provision).

state law to determine whether the assessment at issue is a tax within the meaning of the Tax Injunction Act, arguing that "the label given the assessment by the highest court of a state is dispositive of whether the assessment is [a tax] for purposes of the Act." Brief of Appellants at 21. Because the Bacon court concluded that a similar ordinance imposes a "fee" under West Virginia law, see Bacon, 473 S.E.2d at 751-54, appellants claim that the ordinance before us is not a "tax under state law" and falls outside of the Tax Injunction Act.

We cannot agree. For purposes of the Tax Injunction Act, it is this court that decides whether the state or local law is a tax, guided by "federal law ... rather than ... state tax labels." Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371, 374 (3d Cir. 1978); see Collins Holding Corp., 123 F.3d at 800 n.3 (noting that "[w]hether the body imposing the assessment labels it as a tax or a fee is not dispositive because the label is not always consistent with the true character of the assessment").

Thus, we look to federal law which "make[s] a general distinction between broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory scheme." Collins Holding Corp., 123 F.3d at 800. A tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue "to a general fund, and[is] spent for the benefit of the entire community." Id. (quoting San Juan Cellular Tel. Co. v. Public Serv. Comm'n, 967 F.2d 683, 685 (1st Cir. 1992)). A user fee, by contrast, is a "payment[ ] given in return for a government-provided benefit" and is tied in some fashion to the payor's use of the service. United States v. City of Huntington, 999 F.2d 71, 74 (4th Cir. 1993). Generally speaking, a special assessment imposed by a municipality qualifies as a tax within the meaning of the Tax Injunction Act. See, e.g., Burris, 941 F.2d at 720; Indiana Waste Sys., Inc. v. County of Porter, 787 F. Supp. 859, 865 (N.D. Ind. 1992) (collecting cases).

This court has previously considered an essentially indistinguishable West Virginia municipal ordinance imposing fire service protection fees, and there we concluded that it constituted a tax within the meaning of the Tax Injunction Act because liability for the fee was based upon a resident's property owner status instead of his use of the city service. See City of Huntington, 999 F.2d at 73-74. We are not able to distinguish the fire service protection fee at issue here from the one the court studied in City of Huntington , and, as did that court, we conclude that the fee is a tax for purposes of the Tax Injunction Act.

III.

Finally, Appellants contend that the principles of judicial estoppel prohibit the City from arguing in state court that the assessment here is a fee, while taking the contradictory position in federal court that it is a tax.[3] Judicial estoppel is an equitable doctrine that exists to prevent litigants from playing "fast and loose" with the courts -- to deter improper manipulation of the judiciary. John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 28-29 (4th Cir. 1995). In order for judicial estoppel to apply, (1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position must be one of fact instead of law; (3) the prior position must have been accepted by the court in

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[3] We note ironically that appellants maintained inconsistent positions in federal and state court, essentially making the reverse arguments of the City. In the state proceeding, appellants argued that the fire protection service fee was a tax imposed in violation of Article X of the West Virginia Constitution. J.A. 20F, 20J. Furthermore, in appellants' complaint in this action, they assert that "[t]he fire service fees assessed pursuant to the [o]rdinance are in reality taxes ... and are being imposed ... under the guise and label of `fees.'" (J.A. at 8). By contrast, they contend on appeal that the ordinance imposes a fee which is not subject to the Tax Injunction Act. Thus, appellants ask us to prohibit the City from doing precisely what they do so freely. We decline.

the first proceeding; and (4) the party to be estopped must have acted intentionally, not inadvertently. See Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996), cert. denied, 117 S. Ct. 954 (1997).

The City is not advancing before us a factual position that is inconsistent with any position that it took during the state court proceedings. Rather, the City is simply urging us to conclude that the ordinance amounts to a tax under federal law, while suggesting in state court that state law produces a different result. The City has not changed the facts from one forum to the next; it is simply applying a different body of law. In our view, the City is merely presenting inconsistent legal theories, a practice that is not proscribed by judicial estoppel. See Lowery, 92 F.3d at 224; Tenneco Chemicals, Inc. v. William T. Burnett & Co., 691 F.2d 658, 664-65 (4th Cir. 1982). Furthermore, given the contrary results reached by this court in City of Huntington and the Supreme Court of Appeals of West Virginia in Bacon on the nature of an essentially identical ordinance, we do not find it at all dishonest of the City to argue to us that the assessment here is a tax under federal law, while maintaining in state court that it is not. Accordingly, we conclude that the application of judicial estoppel is not appropriate in these circumstances.

IV.

For the foregoing reasons, we affirm the dismissal of this action by the district court for lack of subject matter jurisdiction.

AFFIRMED

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

CITY OF CLARKSBURG,
a municipal corporation,
Plaintiff,

V.

GRANDEOTTO, INC. a corporation,	CIVIL ACTION NO. 93-C-609-2
BERNARD J. and KATHY A. FOLIO,	CIVIL ACTION NO. 93-C-648-2
MID-CITY LAND CO.,	CIVIL ACTION NO. 93-C-706-2
BERNARD J. FOLIO, d/b/a HIGHRISE ASSOCIATES,	CIVIL ACTION NO. 93-C-707-2
KATHRYN FFOLIO,	CILIV ACTION NO. 94-C-184-2
JOSEPH FOLIO,	CIVIL ACTION NO. 94-C-196-2

Defendants.

MEMORANDUM OF DECISION AND ORDER

FINDINGS OF FACT

The Court, after reviewing the pleadings, depositions answers to interrogatories and admissions on file, pursuant to

Rule 56, W.V.R. Civ. P., makes the following Findings of Fact:

1. Plaintiff, the City of Clarksburg, is a municipality organized under the laws of West Virginia.

2. In 1983, under the authority of W. Va. Code §8-13-13, the City of Clarksburg enacted an ordinance providing for the payment of fire protection service fees by users of such services. The ordinance was amended on January 5, 1985, December 21, 1989, and March 5, 1992 and is currently found in Article 957 of Chapter Five of Part Nine of the Codified Ordinances of the City of Clarksburg, West Virginia, 1981, as amended.

3. Based on legislative findings that the size and use of a building are factors that affect the cost of providing fire protection services, the City devised a classification scheme for fairly distributing the cost of fire protection services. Owners of residential unit structures and dual residential structures were assessed a flat annual rate; owners of multiple-family residential structures and nonresidential unit structures were assessed a rate based on square footage of the building; and tenants of nonresidential unit structures were assesses a lesser rate based on the square footage of the structure rented.

4. The Ordinance, Article 957 of the Codified Ordinance of the City of Clarksburg, West Virginia, as amended, and its various amendments, were published prior to their passage as a Class II legal advertisement, in compliance with W. Va. Code §8-13-13.

5. From its inception and at all times relevant to these consolidated actions, the primary purpose of the fire protection service fee has been to defray the expense of providing fire protection services for the City of Clarksburg.

6. The proceeds generated from the collection of the fire protection service fee have not been, and are not earmarked for use other than to defray the cost of fire protective services for the City of Clarksburg.

7. The proceeds from the fire protection service fee do not exceed the costs of providing the City's fire protection services.

8. The residential rate for the period from September 1, 1988 through March 4, 1992 was $40 per year. The residential rate for the period on and after March 5, 1992 was $60 per year.

9. The rate for owners of nonresidential unit structures and multiple-family residential structures for the period from September 1, 1988 through March 4, 1992 was $0.03 per square foot, with a minimum assessment of $24 per year. The rate for owners of nonresidential and multiple-family residential structure for the period on and after March 5, 1992 was $0.045 per square foot, with a minimum assessment of $36 per year.

10. The rate for nonresidential tenants for the period from September 1, 1988 through March 4, 1992 was $0.015 per square foot, with a minimum assessment of $24 per year. The rate for nonresidential tenants for the period on and after March 5, 1992 was $0.0225 per square foot, with a minimum assessment of $36 per year.

11. By Order entered on the 19th day of September, 1995, this Court found that the City of Clarksburg had erroneously assessed the Defendants at an increased rate for the period of March 1, 1992 through March 4, 1992, by applying a subsequent rate increase effective March 5, 1992 against the real property in question. The assessment against the Defendants have been adjusted accordingly.

12. During the period from January 1, 1990 through June 30, 1993, Defendant Grandeotto, Inc., was the owner of the following described nonresidential unit structures in the City of Clarksburg: one at 353 W. Main Street, which measured 4,032 square feet; one at 200 W. Main Street, which measured 6,324 square feet; one at 345 W. Main Street, which measured 10,500 square feet; and

one at 210-213-215 W. Main Street, which measured 17,952 square feet.

13. For the period from January 1, 1990 through February 29, 1992, the City assessed fire protection service fees against Grandeotto for the following amounts:

353 W. Main Street	$262.08
200 W. Main Street	$411.06
345 W. Main Street	$682.50
210-213-215 W. Main Street	$1,166.88

For the period from March 1, 1992, through June 30, 1993, the City assessed fire protection service fees against Grandeotto for the following amounts:

353 W. Main Street	$241.92
200 W. Main Street	$379.52
345 W. Main Street	$630.082
210-213-215 W. Main Street	$1,077.12

14. Grandeotto has not paid the assessment set forth in paragraphs 13 and 14. Therefore, it has been assessed a 10% penalty in the amount of $484.49, pursuant to Article 957.12(g) of the Codified Ordinances.

15. The assessments against Grandeotto have been adjusted by $6.26 pursuant to the Court's Order entered on September 19, 1996.

16. During the period from January 1, 1990 through June 30, 1993, Bernard J. and Kathy A. Folio were the owners of a residential unit structure in the City of Clarksburg at 202 E. Main Street.

17. During the period from September 1, 1988 through June 30, 1993, Bernard J. and Kathy A. Folio were the owners of a nonresidential unit structure in the City of Clarksburg at 1 Dane Street, which measured 13,490 square feet.

18. During the period from January 1, 1990 through June 30, 1993, Bernard J. and Kathy A. Folio were the owners of the following described nonresidential unit structures in the City of Clarksburg: one at 306 W. Pike Street, which measured 396 square feet; one at 185 Washington Avenue, which measured 763 square feet; one at 124 S. Second Street, which measured 2,695 square feet.

19. For the period from September 1, 1988 through February 29, 1992, the City assessed Bernard J. and Kathy A. Folio for fire protection service fees for 1 Dane Street in the amount of $1,421.16.

20. For the period from January 1, 1990 through February 29, 1992, the City assessed fire protection service fees against Bernard J. and Kathy A. Folio for the following amounts:

202 E. Main Street	$86.84
306 W. pike Street	$52.00
185 Washington Avenue	$52.00
124 S. Second Street	$175.24

21. For the period from March 1, 1992 through June 30, 1993, the City assessed fire protection service fees against Bernard J. and Kathy A. Folio for the following amounts:

1 Dane Street	$809.44
202 E. Main Street	$ 80.00
306 W. Pike Street	$ 48.00
185 Washington Avenue	$ 48.00
124 S. Second Street	$161.76

22. Bernard J. and Kathy A. Folio have not paid the assessment set forth in paragraphs 20, 21 and 22. Therefore, they have been assessed a 10% penalty in the amount of $293.03, pursuant to Article 957.12(g) of the Codified Ordinances.

23. The assessments against Bernard J. and Kathy A. Folio have been adjusted by $3.50 pursuant to the Court's Order entered on September 19, 1996.

24. During the period from January 1, 1990 through June 30, 1993, Defendant Mid-City Land Co. was the owner of the following nonresidential unit structures in the City of Clarksburg: one at 110-112 S. Third Street, which measured 3,900 square feet; one at 205 Washington Avenue, which measured 2,851 square feet; and one at 226 Water Street, which measured 8,535 square feet.

25. For the period from January 1, 1990 through February 29, 1992, the City assessed fire protection service fees against Mid-City Land Co. for the following amounts:

110-112 S. Third Street	$253.50
205 Washington Avenue	$185.38
226 Water Street	$554.84

26. For the period from March 1, 1992 through June 30, 1993, the City assessed fire protection service fees against Mid-City Land Co. for the following amounts:

110-112 S. Third Street	$234.08
205 Washington Avenue	$171.04
226 Water Street	$512.16

27. Mid-City Land Co. has not paid the assessments set forth in paragraphs 26 and 27. Therefore, it has been assessed a 10% penalty in the amount of $190.85, pursuant to Article 957.12(g) of the Codified Ordinances.

28. The assessments against Mid-City Land Co. have been adjusted by $2.47 pursuant to the Court's Order entered September 19, 1996.

29. During the period from January 1, 1990 through June 30, 1993, Defendant Bernard J. Folio, doing business as Highrise Associates, was the owner of the following described nonresidential unit structures in the City

of Clarksburg: one at 128 S. Second Street, which measured 9,324 square feet; and one at 338 Washington Avenue, which measured at 6,518 square feet.

30. For the period from January 1, 1990 through March 4, 1992, the City of Clarksburg assessed fire protection service fees against Bernard J. Folio, d/b/a Highrise Associates for the following amounts:

128 S. Second Street	$606.06
338 Washington Avenue	$423.80

31. For the period from March 5, 1992 through June 30, 1993, the City of Clarksburg assessed fire protection service fees against Bernard J. Folio d/b/a Highrise Associates for the following amounts:

128 S. Second Street	$559.50
338 Washington Avenue	$391.04

32. Bernard J. Folio d/b/a/ Highrise Associates has not paid the assessments set forth in paragraphs 31 and 32. Therefore, he has been assessed a 10% penalty in the amount of $179.79, pursuant to Article 957.12(g) of the Codified Ordinances.

33. The assessments against Bernard J. Folio d/b/a/ Highrise Associates have been adjusted by $2.55 pursuant to the Court's Order entered September 19, 1996.

34. During the period from December 31, 1989 through January 31, 1994, Defendant Kathryn Folio was the owner of a residential unit structure in the City of Clarksburg at 204 E. Main Street.

35. For the period from December 31, 1989 through January 31, 1994, the City of Clarksburg assessed fire protection service fees against Kathryn Folio in the amount of $278.84.

36. For the period from February 1, 1990 through January 31, 1994, the City of Clarksburg assessed solid

waste collection fees against Kathryn Folio in the amount of $340.80.

37. Kathryn Folio has not paid the assessments set forth in paragraphs 36 and 37. Therefore, she has been assessed a 10% penalty in the amount of $61.92, pursuant to Article 957.12(g) of the Codified Ordinances.

38. The assessment against Kathryn Folio has been adjusted by $0.43 pursuant to the Court's Order entered on September 19, 1996.

39. During the period from August 1, 1991 through December 31, 1993, Defendant Joseph Folio was the owner of a residential unit structure in the City of Clarksburg at 205 E. Main Street.

40. For the period from August 1, 1991 through December 31, 1993, the City assessed fire protection service fees against Joseph Folio in the amount of $136.62.

41. Joseph Folio has not paid the assessments set forth in paragraph 41. Therefore, her has been assessed a 10% penalty in the amount of $ 13.61, pursuant to Article 957.12(g) of the Codified Ordinances.

42. The assessment against Joseph Folio has been adjusted by $0.43 pursuant to the Court's Order entered September 19, 1996.

43. The City commenced these consolidated actions to recover theabove-mentioned unpaid assessments and accrued penalties from the Defendants.

44. Defendants have responded by arguing that the fire protection service fee ordinance is invalid and unenforceable because it was not enacted in accordance with state laws, it violates the Tax Limitation Amendment of the West Virginia Constitution, W. Va. Const. art. I, §10, and it violates the Due Process and Equal Protection Clauses of the United States and West Virginia Constitutions because it is unreasonable.

45. Previously, in October 1984, the City commenced an action against Grandeotto, Inc., to recover unpaid fire protection service fees from an earlier billing

period. *City of Clarksburg v. Grandeotto, Inc.*, Civil Action No. 84-C-698-1 (Harrison County Cir. Ct.).

46. Grandeotto responded to the 1984 action by arguing that the fire protection service fee was unreasonable and that it violated W. Va. Const. art. X, §1.

47. In a judgment and order entered on August 12, 1985, Judge McCarthy rejected Grandeotto's defense, held that the fire protection service fee ordinance did not violate the Tax Limitation Amendment to the West Virginia Constitution, held that the fire protection service fee was reasonable as a matter of fact and law, and ordered that the City recover of Grandeotto the unpaid fees, plus interest and the costs of the litigation.

48. Grandeotto, Inc. thereafter filed a Petition for Appeal of Judge McCarthy's decision, and the Supreme Court of Appeals of the State of West Virginia refused to grant the appeal.

CONCLUSIONS OF LAW

After considering the cross-motions for summary judgment, the issues in question and the law covering such matters and as set forth in the Memorandum of Law filed by counsel for each party, the Court concludes as a matter of law as follows:

1. This Court has jurisdiction of this matter pursuant to W. Va. Code §8-13-15 and Article 957.13 of the Codified Ordinances of the City of Clarksburg.

2. W. Va. Code §8-13-13 provides plenary power and authority to cities to assess a reasonable fire protection service fee.

3. The City of Clarksburg substantially complied with the requirements of W. Va. Code §8-13-13 in enacting and amending the Ordinance imposing the City's fire protection service fee.

4. An ordinance passed by the governing body of a municipality is presumed reasonable and constitutional. *Bookman v. Hampshire County Commission*, 193 W. Va. 255, 455 S.E.2d 814, 816 (1995); *Town of Burnsville v. Quik-Pic, Inc.*, 185 W. Va. 696, 408 S.E.2d 646, 650 (1991).

5. Defendants have the burden of overcoming the presumption of validity. *Town of Burnsville v. Quik-Pic, Inc.*, 408 S.E. 2d at 650.

6. As a matter of law, Defendants have failed to meet their burden of proof.

7. As a matter of law, the fire protection service fee ordinance does not violate the Tax Limitation Amendment, W. Va. Const. art. I, §10. *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743, 753-754 (1996).

8. Because Grandeotto, Inc., was a party to *City of Clarksburg v. Grandeotto, Inc.*, a Civil Action No. 84-C-698-1 (Harrison County Cir. Ct. Aug. 12, 1985), in which the identical issues of reasonableness of the fire protection service fee ordinance and validity under W. Va. Const. art. X, §1 were litigated to completion, Grandeotto, Inc., is estopped from challenging the ordinance of those grounds. *State v. Miller*, 194 W. Va. 3, 459 S.E. 2d 114, 120 (1995).

9. The City has a legitimate interest in providing fire protection services. The City properly determined that both tenants and property owners were users of fire protection services.

10. The fire protection service fee imposed under the Ordinance are based on use of services and not property ownership.

11. The City properly determined that building size and use were relevant to the cost of fire protection services.

12. The City properly determined that fire service protection of nonresidential and multiple-family residential structures were more costly than the protection of residential structures based on the frequency and severity of fires within those classifications.

13. Defendants have failed to meet their burden of proving that the classifications selected by the City are arbitrary and unreasonable.

14. Defendants have failed to meet their burden of proving that they were treated differently from other property owners in their same classifications.

15. There is no genuine issue of material fact remaining to be tried on the issues of the legality of the ordinance, nor the liability of the Defendants to pay the fire service protection fees and penalties assessed.

ORDER

NOW, THEREFORE, it is so ORDERED that Plaintiff's motion for summary judgment be, and hereby is, GRANTED and that Defendants motion for summary judgment be, and hereby is, DENIED; and

IT IS FURTHER ORDERED that after making the required adjustments and adding all penalties, Plaintiff, the City of Clarksburg, recover from each of the Defendants the following adjusted amounts, with interest thereon at the rate of ten percentum (10%) per annum from the date of this Order, plus the costs of this action:

Grandeotto, Inc.	$5,335.65
Bernard J. and Kathy A. Folio	$3,227.47
Mid-City Land Co.	$2,101.85
Bernard J. Folio, d/b/a Highrise Associates	$2,178.21
Kathryn Folio	$ 681.56
Joseph Folio	$ 150.24

To all of which, the Plaintiffs, by their counsel, object and except.

ENTER: July 24, 1997

S/Thomas A. Bedell, Chief Judge

Submitted by:
S/ John L. DePolo

S/ Gregory A. Morgan

S/ J. Miles Morgan

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

BERNARD J. FOLIO, MID-CITY LAND CO., BERNARD J. FOLIO d/b/a HIGH RISE ASSOCIATES, INC.; GRANDEOTTO, INC., KATHRYN V. FOLIO and JOSEPH A. FOLIO,

Plaintiffs,

Vs.

THE CITY OF CLARKSBURG, a West Virginia Municipal Corporation, and FRANK FERRARI, Director of Finance for the City of Clarksburg,

Defendants.

CIVIL ACTION NO. 1:96-CV-180
(JUDGE KIDD)

ENTERED: April 14, 1997

MEMORANDUM OPINION AND ORDER

On October 25, 1996, plaintiffs filed this action for Declaratory and Injunctive relief under 28 U.S.C. §§ 1331, 2201 and 42 U.S.C. § 1983. Defendants have filed a timely motion to dismiss pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, asserting that the Court lacks jurisdiction. Said motion, having been fully briefed, is ripe for disposition.

Plaintiffs are owners of real property within the city limits of the defendant City of Clarksburg ("City"). Pursuant to W.Va. Code § 8-13-13, the City enacted Article 957 of the Codified Ordinances of the City of Clarksburg ("Ordinance") which imposes and assesses a fire service fee upon owners and lessees of real property within the City, including the plaintiffs.

Plaintiffs assert in their complaint that the Ordinance is unconstitutional and seek to have this Court declare the same (Count One). Further, plaintiffs seek to have this Court enjoin the defendants from "any future assessments or collections" under the Ordinance (Count Two). Defendants seek dismissal under the Tax Injunction Act, 28 U.S.C. § 1341, asserting that the Court lacks jurisdiction to enjoin enforcement of the Ordinance, which by necessity would require a declaration that the Ordinance is unconstitutional.

Title 28, United States Code, Section 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Clearly, the plaintiffs are seeking to "enjoin, suspend or restrain the assessment, levy or collection" of the Ordinance, a "tax" promulgated under "State law." Furthermore, plaintiffs have a "plain, speedy and efficient remedy" in the Circuit Court of Harrison County, West Virginia, where they are currently being sued by the defendants for payments under the Ordinance. Accordingly, this Court "shall not" entertain this civil action.

Plaintiffs' argument that no "plain, speedy and efficient remedy may be had in the courts" of West Virginia is without merit. The numerous state remedies available to the plaintiffs are "clear and certain" and will "ensure that the opportunity to contest the tax is a meaningful one." McKesson Corp. v. Florida Alcoholic & Tobacco Div., 496 U.S. 18, 39 (1990). What is not "clear and certain" is that the plaintiffs will prevail in the state court system. However, the state does provide a "full hearing and judicial determination" at which any and all constitutional objections to the Ordinance may be raised. This process is what is required by the Tax Injunction Act and the Due Process

Clause, not the end result. Rosewell v. LaSalle National Bank, 450 U.S. 503, 512-24 (1981). Therefore, the Court finds that West Virginia "offers in her courts the opportunity for a plain, speedy and efficient remedy within the meaning of 28 U.S.C. § 1341." Hutcherson v. Board of Supervisors of Franklin County, Va., 742 F.2d 142, 145-46 (4th Cir. 1984); Intern. Lotto Fund v. Virginia State Lottery, 20 F.3d 589, 593 (4th Cir. 1994).

Plaintiffs also argue that the Ordinance is not a "tax" subject to the Tax Injunction Act. In determining whether the Ordinance comes under the Tax Injunction Act, the Court looks not to the label put on the Ordinance by the respective parties, but to the purpose for which the funds are generated by the Ordinance. Robinson Protective, Etc. v. City of Philadelphia, 581 F.2d 371, 374-76 (3d Cir. 1978). The inquiry is "whether the assessment in question is for revenue raising purposes or merely a regulatory or punitive levy in the nature of a privilege fee." Wright v. McClain, 835 F.2d 143, 145 (6th Cir. 1987). Here, the revenues are being raised for the public's benefit, namely to fund the fire department, an essential public service provided by the City to its citizens. Clearly, for the purpose of the Tax Injunction Act, the Ordinance is a "tax." The Court so finds.

Accordingly, the Court holds that the Tax Injunction Act bars the Court from enjoining, suspending or restraining the assessment, levy or collection of the Ordinance. Furthermore, the Court may not issue a declaratory judgment holding the Ordinance unconstitutional. California v. Grace Brethren Church, 457 U.S. 393, 408-11 (1982)

Finally, plaintiffs assert that they should be permitted to proceed with their other claims against the defendants which may not be technically within the Tax Injunction Act. However the Court concludes that principles of comity, which underlie and augment the Tax Injunction Act, bar these other claims as well. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 115-16 (1981); Cox Cable

Hampton Roads v. City of Norfolk, Va., 739 F.Supp. 1074 (E.D.Va. 1990).

Therefore, defendants' motion to dismiss pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, is hereby GRANTED and this action is DISMISSED without prejudice.

It is so ORDERED.

Judgment shall be entered accordingly, and this action shall be DISMISSED and removed from the docket of the Court.

The Clerk is directed to transmit certified copies of this Memorandum Opinion and Order to Counsel of record herein.

ENTER: April 14, 1997

/s/ William M. Kidd
William M. Kidd
Senior United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

BERNARD J. FOLIO, MID-CITY LAND CO., BERNARD J. FOLIO, d/b/a HIGH RISE ASSOCIATES, INC.,: GRANDEOTTO, INC., KATHRYN V. FOLIO, and JOSEPH A. FOLIO,

V.

THE CITY OF CLARKSBURG, a West Virginia Municipal Corporation, and FRANK FERRARI, Director of Finance for the City of Clarksburg.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 1:96-cv-180

FILED: April 14, 1997
ENTERED: April 14, 1997

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' motion to dismiss pursuant to Rule 12(b)(1), of the Federal Rules of Civil Procedure, is hereby granted and this action is dismissed without prejudice. This action is stricken from the docket of this Court.

April 14, 1997 — *Date*

Dr. WALLY EDGELL, Ph.D., CLERK — *Clerk*

/s/_____
(By) Deputy Clerk

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1996 Term

No. 23067

THE CITY OF HUNTINGTON,
A WEST VIRGINIA MUNICIPAL CORPORATION,
Plaintiff Below, Appellee

v.

JOHN A. BACON AND
CAROLE A. BACON,
Defendants Below, Appellants

Appeal from the Circuit Court of Cabell County
Honorable L. D. Egnor, Judge
Civil Action No. 95-C-11

AFFIRMED

Submitted: January 23, 1996
Filed: June 14, 1996
Entered: June 14, 1996

J. William St. Clair	Jendonnae L. Houdyschell
St. Clair & Levine	Assistant City Attorney
Huntington, West Virginia	Huntington, West Virginia
Attorney for the Appellants	Attorney for the Appellee

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1996 Term

No. 23070

THE CITY OF HUNTINGTON,
A WEST VIRGINIA MUNICIPAL CORPORATION,
Plaintiff Below

v.

THE CABELL COUNTY BOARD OF EDUCATION,
A WEST VIRGINIA PUBLIC CORPORATION,
Defendant Below

Certified Question from the Circuit Court of Cabell County
Honorable L. D. Egnor, Judge

Civil Action No. 89-C-233

Certified Question Answered

Submitted: January 23, 1996
Filed: June 14, 1996
Entered: June 14, 1996

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CHIEF JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed de novo." Syllabus point 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. pt. 1, State v. Miller, ___ W. Va. ___, 459 S.E.2d 114 (1995).

3. "'Municipalities have no inherent power with regard to the exercise of the functions of their government. Such power depends solely upon grants of power by Acts of Legislature, and the Legislature may at any time modify, change or withdraw any power so granted by general law in conformance with the provisions of the Constitution, Article VI, Section 39(a).' Point 2, Syllabus, State ex rel. Alexander v. The County Court of Kanawha County, et al., 147 W. Va. 693 [, 130 S.E.2d 200 (1963)]." Syl. pt. 1, State ex rel. Plymale v. City of Huntington, 147 W. Va. 728, 131 S.E.2d 160 (1963).

4. "The character of a tax is determined not by its label but by analyzing its operation and effect." Syl. pt. 2, City of Fairmont v. Pitrolo Pontiac-Cadillac, 172 W. Va. 505, 308 S.E.2d 527 (1983).

5. "The essential characteristic of an ad valorem tax, as its name suggests, is that the tax is levied according to the value of the property. Also, assessment on a regular basis is a common characteristic." Syl. pt. 3, City of Fairmont v. Pitrolo Pontiac-Cadillac, 172 W. Va. 505, 308 S.E.2d 527 (1983).

6. An ordinance which imposes a municipal service fee pursuant to W. Va. Code, 8-13-13 [1971] upon the

owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in W. Va. Const. art. X, § 1.

7. "The Board of Education of a school-district is a corporation created by statute with functions of a public nature expressly given and no other; and it can exercise no power not expressly conferred or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute." Syl. pt. 4, Shinn v. Board of Education, 39 W. Va. 497, 20 S.E. 604 (1894).

8. Pursuant to W. Va. Code, 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality for fire and flood protection services pursuant to W. Va. Code, 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order.

McHugh, Chief Justice:

The two cases before us were consolidated for argument and opinion. In the first case, the appellants, John Bacon, Carole Bacon, and other owners of buildings in the City of Huntington (hereinafter "the Bacons") appeal the April 25, 1995 order of the Circuit Court of Cabell County which granted summary judgment for the City of Huntington. In the second case, the Circuit Court of Cabell County certified a question to this Court from a declaratory judgment action in which the City of Huntington (hereinafter "City") and the Cabell County Board of Education (hereinafter "Board of Education") are parties.[1]

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[1] The West Virginia Municipal League, Inc., Wheeling College, Inc., Rev. Bernard W. Schmitt, and the City of Wheeling submitted amicus curiae briefs.

Both cases involve the resolution of the following issue: Whether the City 's municipal service fee imposed upon owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot in order to defray the cost of fire and flood protection services is a fee or tax. For reasons explained below, we find the municipal service fee to be a fee and not a tax.

I.

In order to facilitate an understanding of how the two cases arose, a history of the municipal service fee in Huntington needs to be discussed. Furthermore, the procedural history of each case should be noted.

A.

History of the municipal service fee

In 1990 the City passed an ordinance imposing a municipal service fee in order to defray the cost of providing fire and flood protection services:

> On or after July 1, 1990, there is hereby imposed upon all users of Municipal services a municipal service fee for each lot or parcel of land containing any building or structure owned by each user. The fee shall be imposed at an annual rate of seventy dollars ($70.00) per lot plus $0.0375 per square foot of floor space contained in each building or structure existing on each such lot.[2]

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[2] It is not necessary for this Court to discuss in any detail the difference between the imposition of a flat rate charge upon the owner of a building and a charge based upon the square footage of a building and a charge based upon the square footage of a building.

Ordinance § 773.03 (footnote added). The term "user" in the above ordinance is defined in the following manner:

> For purposes of this article, 'user of municipal services' and 'user' refers to any person, firm, corporation or governmental entity of any kind owning any building or structure, whether residential, commercial, governmental or otherwise, within the limits of the City which benefits from fire and/or flood protection services provided by the City.

Ordinance § 773.02.

In 1991 the City amended ordinance § 773.03 by increasing the rate to $80.00 per lot and $0.0575 per square foot. Additionally, that amendment allocated $250,000.00 of the municipal service fee collected between 1991 and 1994 to the improvement of streets and municipal infrastructure. According to the City, since 1994, the municipal service fee is no longer being used to improve streets and municipal infrastructure.

B.

The Bacons

The City filed suit against the Bacons in order to collect the municipal service fee assessed against them. The Bacons maintained they were not required to pay the municipal service fee because the fee was a tax which violated the Tax Limitation Amendment found in W. Va. Const. art. X, § 1.[3] The Bacons relied, inter alia, upon

[3] The Tax Limitation Amendment found in W. Va. Const. art. X, § 1 imposes limits beyond which property may not be subjected to taxation.

United States v. City of Huntington, 999 F.2d 71 (4th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1048, 127 L. Ed. 2d 371 (1994), which held the municipal service fee was a tax which an agency of the federal government was not obligated to pay pursuant to the Supremacy Clause of the Constitution of the United States.[4] More specifically, the Bacons argued that the City of Huntington case collaterally estops the City from raising the issue of whether the municipal service fee is a tax or fee in state court.

The circuit court disagreed and concluded that the municipal service fee was a user fee which the City properly imposed upon the Bacons pursuant to W. Va. Code, 8-13-13 [1971]. Thus, the circuit court granted the motion for summary judgment by the City thereby ordering the Bacons to pay the municipal service fee.

The Bacons have filed the appeal now before us asserting that the application of the doctrine of collateral estoppel mandates the circuit court to uphold the Fourth Circuit's determination that the municipal service fee is a tax in violation of the Tax Limitation Amendment of our State

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[4] The Supremacy Clause is found in article VI of the Constitution of the United States, which states, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The principle that states cannot tax the United States was derived from McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819). More recently it has been explained that "'a State may not, consistent with the Supremacy Clause, U.S. Const., Art. VI, cl. 2 lay a tax "directly upon the United States" . . . . [T]he Court has never questioned the propriety of absolute immunity from state taxation.'" City of Huntington, 999 F.2d at 73 (citations omitted).

Constitution. In the alternative, the Bacons maintain that the municipal service fee is a tax pursuant to state law which also violates the Tax Limitation Amendment. Lastly, the Bacons assert that even if the municipal service fee is a fee, it is unreasonably applied to them.

C.

Cabell County Board of Education

On February 16, 1989, the City brought a declaratory judgment action pursuant to W. Va. Code, 55-13-1 [1941] in order to seek a declaration of its rights to recover certain municipal fees assessed against the Board of Education. On June 22, 1995, the Circuit Court of Cabell County, sua sponte, issued an order certifying the following question to this Court: "May the City of Huntington continue to impose its Municipal Service Fee for Fire and Flood protection upon the Board of Education of Cabell County, West Virginia in light of [United States v. City of Huntington, 999 F.2d 71 (4th Cir. 1993)]?"

The circuit court answered the question in the affirmative, holding that the City of Huntington case from the Fourth Circuit Court of Appeals did not bar the City from seeking the municipal service fee from the Board of Education. Implicitly, the circuit court determined the municipal service fee was a fee and not a tax. Thus, the circuit court concluded the fee could be assessed against the Cabell County Board of Education.

The Board of Education, in the action now before us, maintains that the municipal service fee is a tax (either because the collateral estoppel doctrine mandates the circuit court to apply the Fourth Circuit's holding or because of state law) which it is exempt from paying pursuant to W. Va. Code, 11-3-9 [1990].[5] The Board of Education also

[5] W. Va. Code, 11-3-9 [1990] concerns property which is exempt from taxation. More specifically, W. Va. Code, 11-3-9 [1990] states, in

maintains that even if the municipal service fee is found to be a fee, there is no legislative enactment obligating it to pay such a fee.

II.

At the outset, we note that "[a] circuit court's entry of summary judgment is reviewed de novo." Syllabus point 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). See also syl. pt. 1, Jones v. Wesbanco Bank Parkersburg, 194 W. Va. 381, 460 S.E.2d 627 (1995) and syllabus point 1, State v. Morgan Stanley Co., Inc., 194 W. Va. 163, 459 S.E.2d 906 (1995). Additionally, we have stated that "we retain some flexibility in determining how and to what extent . . . [a certified question from a circuit court to us] will be answered." City of Fairmont v. Retail, Wholesale, & Dept. Store Union, 166 W. Va. 1, 3-4, 283 S.E.2d 589, 590 (1980), citing West Virginia Water Service Co. v. Cunningham, 143 W. Va. 1, 98 S.E.2d 891 (1957). See also syl. pt. 3, Kincaid v. Mangum, 189 W. Va. 404, 432 S.E.2d 74 (1993).

Although the Bacons and Board of Education raise different arguments, there essentially are three common issues which must be resolved in these consolidated cases: (1) Does collateral estoppel apply; (2) Is the municipal service fee a fee or tax pursuant to state law; and (3) Does the municipal service fee reasonably serve the purpose for which it was enacted?

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relevant part, that all property which "belong[s] exclusively to any county, district, city, village or town in this state, and used for public purposes . . . " is exempt from taxation. W. Va. Code, 11-3-9 [1990] also exempts from taxation any property "belonging to, or held in trust for . . . free schools, if used for educational, literary or scientific purposes[.]" See also W. Va. Const. art. X, § 1 (Legislature may exempt all property used for educational purposes from taxation).

A.

Collateral Estoppel

As we have previously discussed, the Fourth Circuit in City of Huntington determined that the municipal service fee presently at issue to be a tax. The first issue on appeal is whether the Fourth Circuit's holding collaterally estops the City from arguing that the municipal service fee is a fee.

We begin our analysis with a brief discussion of the collateral estoppel doctrine. The purpose of the collateral estoppel doctrine is "to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit." Syl. pt. 2, in part, Conley v. Spillers, 171 W. Va. 584, 301 S.E.2d 216 (1983). We have outlined four conditions which must be met before collateral estoppel will bar a claim in syllabus point 1 of State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995):

> Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

(emphasis added). See also syl. pt. 6, Conley, supra. In the case before us, the focus is on the first condition of collateral estoppel. We have stated that an analysis of the first condition involves not only a determination of whether the facts are similar, but also a determination of whether the

legal standards and procedures used to assess the facts are similar. Miller, 194 W. Va. at 10, 459 S.E.2d at 121.

With this in mind we will examine the history of the City of Huntington case in order to determine whether the collateral estoppel doctrine is applicable. The case arose in the Fourth Circuit Court of Appeals after the United States filed a complaint in the United States District Court seeking an injunction in order to prohibit the City from imposing the municipal service fee on the United States Postal Service and the United States General Services Administration. United States v. City of Huntington, 793 F. Supp. 1370 (S. D. W. Va. 1992). The United States sought a declaration that the assessed fee was a tax which it was not obligated to pay pursuant to the Supremacy Clause of the Constitution of the United States. Id. The district court concluded that the City of Huntington's municipal service fee was a user fee which the federal government agencies had to pay.[6]

The United States Court of Appeals of the Fourth Circuit reversed the United States District Court's decision. United States v. City of Huntington, 999 F.2d 71 (4th Cir. 1993). In so ruling, the Court of Appeals noted the following definitions of fee and tax: "User fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are 'enforced contribution[s] for the

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[6] In arriving at its conclusion, the United States District Court acknowledged that "[s]tates are without authority to tax the United States[,]" but noted the United States "must pay reasonable users fees." Id. at 1371. When analyzing the specific nature of the exaction imposed by the City, the district court stated that the "fire and flood fees bear a reasonable relationship to the consuming public[] [because] [t]hose who own buildings are the users of the fire and flood protection services." Id. at 1371. Thus, the district court found the nature of the exaction to be more like a user fee than a tax. Additionally, the court noted because the revenue from the municipal service fee was inadequate to cover the costs of providing those services, the municipal service fee was not an "enforced contribution to provide for the support of Government." Id. at 1372 (citation omitted).

support of government.'" Id. at 74 (citations omitted). The court went on to state "[l]iability for the 'user fee' charged by the City arises from . . . [the United State's] status as [a] property owner[] and not from . . . [its] use of a City service." Id. at 74 (footnote omitted). The Court of Appeals concluded there was no "relevant difference between the square-footage method of assessment [which is how the municipal service fee is assessed] and the ad valorem method [which is a tax based upon the value of property]." Id. at 74.

The Bacons and the Board of Education maintain that the issue before the Fourth Circuit regarding whether the municipal service fee is a tax or fee is exactly the same issue before the circuit court in each of their respective cases. Moreover, the Bacons and the Board of Education assert that the legal principles have not changed since the Fourth Circuit addressed the issue.

Conversely, the City argues that the Fourth Circuit decided a different issue. More specifically, the City maintains that the issue before the Fourth Circuit was whether the municipal service fee was a tax which the City could not impose on a federal entity pursuant to the Supremacy Clause of the Constitution of the United States. The City maintains that because neither the Bacons nor the Board of Education is entitled to any immunities under the Constitution of the United States, the Fourth Circuit's holding is not applicable to them. We agree.

The Supreme Court of the United States has made clear that the states are free to chose their own fiscal policies: "The State is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject, so far as the Federal power is concerned, to the restricting regulations of the Constitution of the United States." Kentucky Union Co. v. Kentucky, 219 U.S. 140, 151, 31 S. Ct. 171, 176, 55 L. Ed. 137, 154 (1911). See also Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S. Ct. 246, 249-50, 85 L. Ed. 267, 270 (1940) ("A state is free to pursue its own fiscal policies, unembarrassed by the

Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.").

The only limitations the Supreme Court of the United States may impose upon a state's power to determine its own fiscal policies are those expressed in the Constitution of the United States. Kentucky Union Co., supra. One such limitation expressed in the Constitution of the United States is that the federal government is not subject to any **taxation** by a state or political subdivision unless explicitly authorized by Congress. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819) and United States v. Harford County, 572 F. Supp. 239 (Dist. Ct. Md. 1983). Therefore, where a federal entity is involved, the federal courts may determine whether a particular funding mechanism employed by a state or its political subdivision is, in fact, a tax: "Where a federal right is involved, a federal court is not bound by the characterization given to a state tax by a state court nor relieved from the duty of considering the real nature of the tax and its effect on the federal right asserted." Harford County, 572 F. Supp. at 242 (citing Carpenter v. Shaw, 280 U.S. 363, 367-68, 50 S. Ct 121, 122-23, 74 L. Ed. 478, 482 (1930); United States v. Allegany, 322 U.S. 174, 184, 64 S. Ct. 908, 914, 88 L. Ed. 1209, 1217 (1944)).

It follows, therefore, that a state is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the Constitution of the United States. Kentucky Union Co., supra.

Accordingly, the circuit court properly determined that the Bacons and the Board of Education could not assert collateral estoppel in the cases before us, as the issue resolved by the Fourth Circuit in City of Huntington, supra,

clearly differs from the issues now pending. See syl. pt. 1, Miller, supra. Therefore, we must address the issue of whether the City's municipal service fee is a tax or a fee pursuant to state law.[7]

B.

Municipal service fee is a user fee

The City derives all of its power as well as its existence from the legislature:

> 'Municipalities have no inherent power with regard to the exercise of the functions of their government. Such power depends solely upon grants of power by Acts of the Legislature, and the Legislature may at any time modify, change or withdraw any power so granted by general law in conformance with the provisions of the Constitution, Article VI, Section 39(a).'[8]

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[7] This issue is difficult, and one we address with reservations. The Bacons and the Board of Education are concerned about the label of the municipal service fee for different reasons. As previously noted, the Bacons argue that the municipal service fee is a tax which violates the Tax Limitation Amendment of our State Constitution. The Board of Education, on the other hand, argues that the municipal service fee is a tax which it is not obligated to pay pursuant to W. Va. Code, 11-3-9 [1991]. See n. 5, supra. However, in that both arguments involve the determination of whether the municipal service fee is a tax or fee, we will focus on that issue.

[8] W. Va. Const. art. VI, § 39(a) provides, in pertinent part, that

> [t]he legislature shall provide by general laws for the incorporation and government of cities, towns and villages[, and] [s]uch general laws shall restrict the powers of such cities, towns and villages to borrow money and contract debts, and shall limit the rate of

> Point 2, Syllabus, State ex rel. Alexander v. The County Court of Kanawha County, et al., 147 W. Va. 643 [, 130 S.E.2d 200 (1963)].

Syl. pt. 1, State ex rel. Plymale v. City of Huntington, 147 W. Va. 728, 131 S.E.2d 160 (1963) (footnote added). See also syl. pt. 1, Toler v. City of Huntington, 153 W. Va. 313, 168 S.E.2d 551 (1969); syl. pt. 1, Chesapeake & Potomac Telephone Co. v. City of Morgantown, 144 W. Va. 149, 107 S.E.2d 489 (1959). Cf. syllabus point 1, in relevant part, Hukle v. City of Huntington, 134 W. Va. 249, 58 S.E.2d 780 (1950) (Because a municipality has no inherent power to levy taxes, the municipality may only do so pursuant to the authority granted to it by the legislature). Therefore, the City only has the authority to impose the fees or taxes which are authorized by the legislature. Id. See also W. Va. Const. art. X, § 9.[9] The legislature specifically authorized municipalities "to impose by ordinance upon the users of

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> taxes for municipal purposes, in accordance with section one, article ten of the Constitution of the State of West Virginia. Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted.

[9] W. Va. Const. art. X, § 9 states: "The legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same."

["essential or special municipal service, including, but not limited to, police and fire protection . . . and any other similar matter"] reasonable rates, fees and charges to be collected in the manner specified in the ordinance[.]" W. Va. Code, 8-13-13 [1971], in relevant part (emphasis added). It was pursuant to the authority conferred upon it by W. Va. Code, 8-13-13 [1971] that the City imposed its municipal service fee for fire and flood protection services.

Though the above language employed by the legislature in W. Va. Code, 8-13-13 [1971] suggests that the legislature intended the charges imposed on the users of essential or special municipal services to be user fees rather than taxes, this Court has held "[t]he character of a tax is determined not by its label but by analyzing its operation and effect." Syl. pt. 2, City of Fairmont v. Pitrolo Pontiac-Cadillac, 172 W. Va. 505, 308 S.E.2d 527 (1983), cert. denied, 466 U.S. 958, 104 S. Ct. 2169, 80 L. Ed. 2d 553 (1984) (emphasis added). See also syl. pt. 2, Solid Waste Authority v. Division of Natural Resources, ___ W. Va. ___, 462 S.E.2d 349 (1995) and Hukle, 134 W. Va. at 255, 58 S.E. 2d at 783 ("It is well-nigh universal principle that courts will determine and classify taxation on the basis of realities, rather than what the tax is called in the taxing statute or ordinance." (citation omitted)). However, "it is difficult to categorize an assessment as a fee or a tax because the courts have not adopted universal definitions of these terms." Solid Waste Authority, ___ W. Va. at ___, 462 S.E.2d at 353.

Nevertheless, in recognition of the legislature's constitutional power to determine this State's fiscal policy, this Court has accorded it and municipalities wide latitude in how they choose to fund municipal services, such as those for fire and flood protection. See W. Va. Const. art. VI, § 51; art. X, § 3; and art. X, § 5. The legislature's power to determine this State's fiscal policy is limited only by the Constitution. See also syl. pt. 3, State ex rel. Lambert v. County Comm'n, 192 W. Va. 448, 452 S.E.2d 906 (1994)

(This Court must use every reasonable construction of a legislative enactment in order to sustain its constitutionality).

Thus, the role of this Court is to examine the "operation and effect" of a charge imposed for a service by a municipality pursuant to the legislature's authorization in W. Va. Code, 8-13-13 [1971] to determine whether the charge violates a constitutional provision. See syl. pt. 2, City of Fairmont, supra. We are less concerned with the label of the charge and more concerned with upholding our Constitution.

Though our case law reveals a somewhat convoluted history in the area of taxes and fees, this Court has generally operated on the premise that charges for services rendered by a municipality are user fees and not taxes. See City of Charleston v. Board of Education, 158 W. Va. 141, 145, 209 S.E.2d 55, 57 (1974) (the charge for fire protection is a fee and not a tax); City of Moundsville v. Steele, 152 W. Va. 465, 164 S.E.2d 430 (1968) (charge of $0.25 per front foot for street improvement is a fee and not a tax); and Duling Bros. Co. v. City of Huntington, 120 W. Va. 85, 89-90, 196 S.E. 552, 554-55 (1938) (charges for a flood control program are not subject to ordinary taxing regulations). This premise is based on the following definitions of tax and fee: "[T]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities." River Falls v. St. Bridget's Catholic Church, 513 N.W.2d 673, 675 (Wis. Ct. App. 1994) (citing State v. Jackman, 211 N.W.2d 480, 485 (1973) and emphasis added). On the other hand, where the "operation and effect" of a service charge appears to impose a tax, then this Court examines the service charge more closely. For example, in City of Fairmont v. Pitrolo Pontiac-Cadillac, 172 W. Va. 505, 308 S.E.2d 527 (1983) this Court found the police service charge imposed by the City of Fairmont to be an ad valorem tax which violated the Tax Limitation Amendment found in W. Va. Const. art. X, § 1 rather than a user fee. We determined that the "operation and effect" of

the police service charge was the same as the "operation and effect" of an ad valorem tax because the police service fee, like an ad valorem tax, was imposed according to the value of the property. Id. at syl. pts. 1 and 3. See also Hare v. City of Wheeling, 171 W. Va. 284, 298 S.E.2d 820 (1982) (A police service charge imposed upon owners of property by the City of Wheeling based upon the value of property as determined by the books of the county assessor is, in fact, an ad valorem tax which violates W. Va. Const. art. X, § 1 rather than a user fee).

Conversely, if the "operation and effect" of the service charge imposed by a municipality does not give the appearance of being a tax, and if an ordinance enacted pursuant to W. Va. Code, 8-13-13 [1971] "reasonably serves the purpose for which it was enacted," then this Court will defer to the municipality's wisdom in imposing the service charge. Ellison v. City of Parkersburg, 168 W. Va. 468, 472, 284 S.E.2d 903, 906 (1981).

In the case before us, the Bacons and the Board of Education maintain the City's municipal service fee is, in fact, an ad valorem tax because the rate of the fee is based upon the square footage of space contained in each structure. In syllabus point 3 of City of Fairmont, supra, we held: "The essential characteristic of an ad valorem tax, as its name suggests, is that the tax is levied according to the value of the property. Also, assessment on a regular basis is a common characteristic." Although the City's municipal service fee is assessed on a regular basis, it is not based upon the value of the property. Under the language of the municipal service fee ordinance, a building worth several million dollars which has the same square footage as a building worth a fraction of that would be assessed identical municipal service fees. By imposing a charge based upon a structure's square footage, the City creatively avoided the results in City of Fairmont. However, the square footage assessment does not make the municipal service fee, in fact, an ad valorem tax.

The Bacons and the Board of Education also argue that the municipal service fee falls within the traditional definition of a property tax: "'The consensus of opinion appears to be that a property tax is a charge on the owner of property by reason of his ownership alone without regard to any use that might be made of it, Bromley v. McCaughan, 280 U.S. 124, 136, 50 S. Ct. 46 [, 47], 74 L. Ed. 226 (1929)[.]'" City of Fairmont, 172 W. Va. at 509, 308 S.E.2d at 531 (quoting Weaver v. Prince George's County, 379 A.2d 399, 403-04 (Md. 1977) and citations omitted). The Bacons and Board of Education focus on the above definition in isolation which can often be misleading. For example, in this case the City imposed its municipal service fee on the primary users of its flood and fire protection services. These primary users happen to be property owners. Thus, the City did not impose the municipal service fee on the owners of property by reason of their ownership alone. Instead, the fee is imposed upon property owners by reason of their use of fire and flood protection services. Therefore, the municipal service fee is not a property tax in this instance.

Lastly, the Bacons and the Board of Education argue that because the proceeds from the collection of the municipal service fee are not used exclusively to pay for fire and flood protection services, the municipal service fee is a tax. We agree that the proceeds from the collection of the municipal service fee must be used exclusively to pay for fire and flood protection services. As previously noted, in the past, the City earmarked proceeds from the collection of the municipal service fee to improve streets and municipal infrastructure. See Ordinance § 773.03(c) (1991) ("Of the amount collected under this fee, the amount of $250,000.00 shall be allocated to improve streets and municipal infrastructure each year for the fiscal years 1991-1992, 1992-1993 and 1993-1994.") The "operation and effect" of using the proceeds to improve streets and municipal infrastructure makes the municipal service fee a tax. Currently, however,

the municipal service fee is not being used in this manner. Therefore, as long as the proceeds generated from the collection of the municipal service fee are not earmarked for use other than to defray the cost of providing fire and flood protection services and as long as the proceeds do not exceed the costs of providing fire and flood protection services, we find that the "operation and effect" of the municipal service fee to be that of a fee.

Accordingly, we hold that an ordinance which imposes a municipal service fee pursuant to W. Va. Code, 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in W. Va. Const. art. X, § 1.

C.

Municipal service fee
reasonably serves its purpose

Having established the service charge in this case to be a fee, we must now determine whether the City has properly used the authority granted to it by the legislature in W. Va. Code, 8-13-13 [1971]. We have stated that

> [t]he standard of review of an ordinance exercising such power as that granted by W. Va. Code, 8-13-13 [1971] is the reasonableness of the ordinance. See Harvey v. Elkins, 65 W. Va. 305, 64 S.E. 247 (1909). The determination of whether an ordinance reasonably serves the purpose for which it was enacted is initially made by the municipal authorities. Their passage of the ordinance

> gives it a presumptive validity and a court should not hold the ordinance to be invalid unless it is clear that the ordinance is unreasonable. Henderson v. Bluefield, 98 W. Va. 640, 127 S.E. 492 (1925).

Ellison v. City of Parkersburg, 168 W. Va. 468, 472, 284 S.E.2d 903, 906 (1981).

The Bacons and the Board of Education make three arguments in support of their contention that the ordinance which imposes the municipal service fee for fire and flood protection services is unreasonable as applied to them. First, they maintain that the fee is unreasonable because it is not imposed upon all users of the fire and flood protection services. For instance, fire departments respond to automobile accidents, hazardous materials spills, tenant's fires, and vacant lots which might catch fire, yet the ordinance does not impose the municipal service fee on any of these potential users. Thus, the Bacons and the Board of Education conclude that the municipal service fee for fire and flood protection does not reasonably burden the users of the services.

We disagree. We were confronted with a similar issue in Citizens for Fair Taxation v. Clay County Comm'n, 192 W. Va. 408, 452 S.E.2d 724 (1994), which involves a statutory provision similar to W. Va. Code, 8-13-13 [1971] in that it authorized a county commission to impose a special service fee upon the users of emergency ambulance services. See W. Va. Code, 7-15-17 [1975]. The Clay County Commission, pursuant to the authority granted to it by the legislature in W. Va. Code, 7-15-17 [1975], enacted an ordinance which imposed an emergency service fee of $25 a year on each household, regardless of the number of members in the household, in Clay County.

The appellants in Citizens for Fair Taxation argued that the imposition of the fee upon each household, regardless of the number of members in the household, was

inequitable "because a single person living in an apartment pays the same $25 that the head of a ten-child household pays while the owner of a hunting camp that is used only occasionally pays nothing." Id. at 411, 452 S.E.2d at 727. In response to the appellants' argument, this Court stated:

> We recognize that perfect equity is impossible to achieve in any tax[10] scheme, but perfect equity is not the test. The fee enacted by the Clay County Commission succeeds in imposing upon and collecting 'from the users of emergency ambulance service within the county a special service fee[.]' . . . Given the

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[10] Although this Court uses the term "tax" in the above paragraph, this Court was not confronted with the issue of whether the special emergency ambulance service fee was a tax or fee in Citizens for Fair Taxation, supra. Instead, this Court was confronted with the following two issues:

> (1) the ambulance service fee confounds the equal and uniform property taxation requirement of W. Va. Const. art. X, § 1 because the fee is imposed only upon occupants of residential property and not upon mineral owners and other owners of raw land; and, (2) the gross underassessment of natural resource property in Class III imposes an unfair burden on the homeowners in Class II[.]

Citizens for Fair Taxation, 192 W. Va. at 409-10, 452 S.E.2d at 725-26.

Similarly, in Nine v. Grant Town, 190 W. Va. 86, 88, 437 S.E.2d 250, 252 (1993) we stated that "the purpose of W. Va. Code, 8-13-13, is to allow municipalities to enact **tax** ordinances to defray the cost of certain municipal services and to impose the **tax** on it citizens who are users of such services." (emphasis added). However, in Nine, as in Citizens for Fair Taxation, we were not determining whether a particular charge imposed pursuant to W. Va. Code, 8-13-13 was a tax or fee. In that we have held in previous cases that certain charges imposed pursuant to W. Va. Code, 8-13-13 are fees rather than taxes, these two cases do not imply that every charge imposed pursuant to W. Va. Code, 8-13-13 [1971] or pursuant to a statute allowing a municipality to impose a charge for services it provides is a tax.

> administrative difficulties of collecting the fee on any basis other than a per household basis, we find that the fee imposed is sufficiently related to the use of the special service for which the fee is imposed that the scheme survives constitutional challenge.

Id. (footnote added). This Court has, thus, recognized that charges for services provided by municipalities cannot always be equally achieved upon all users. This Court will uphold the fee if it is sufficiently related to the use of the special service for which the fee is imposed.

In the case before us, although the municipal service fee is not imposed upon **all** users of the City's fire and flood protection services, common sense dictates that owners of property benefit most by these services. Thus, the ordinance reasonably imposes a service fee which is sufficiently related to the use of the City's fire and flood protection services.[11]

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[11] The Bacons rely on that portion of McCoy v. City of Sistersville, 120 W. Va. 471, 199 S.E. 260 (1938) which held that imposing a charge for street lighting, garbage collection, sewage disposal and street cleaning only on property owners to the exclusion of other users of such services (i.e. the general public) is not in conformance with a municipality's statutory authority. More specifically, the Bacons argue that McCoy stands for the proposition that imposing the City of Huntington's municipal service fee only on property owners to the exclusion of other users is not in conformity with W. Va. Code, 8-13-13 [1971].

First, we point out McCoy was decided under W. Va. Code, 8-4-20 [1933] which was replaced by W. Va. Code, 8-13-13 [1971]. The two statutes are worded differently in that W. Va. Code, 8-13-13 [1971] gives municipalities "plenary power and authority" whereas W. Va. Code, 8-4-20 [1933] merely provided that "municipal authority may by proper ordinance provide for . . . such special service." See Ellison v. City of Parkersburg, 168 W. Va. 468, 472 n.1, 284 S.E.2d 903, 906 n. 1 (1981). Although neither W. Va. Code, 8-4-20 [1933] nor 8-13-13 [1971] explains what method is to be used to identify who is a "user" of an essential [illegible] special service, this Court has given more deference to a municipality's definition of user under W. Va. Code, 8-13-13 [1971]'s

Second, the Bacons assert that the municipal service fee for flood protection services is unreasonably imposed upon them because their buildings are located at an elevation substantially above the flood wall. Thus, they argue they should not be required to pay fees for services from which they will never benefit.

In City of Princeton v. Stamper, ___ W. Va. ___, 466 S.E.2d 536 (1995), we addressed a similar issue. In that case, the City of Princeton enacted an ordinance which imposed a mandatory service fee on its residents for the collection and removal of refuse. The appellants argued that they should not be required to pay the mandatory service fee because they chose to use the services of a private hauler rather than the City of Princeton. We rejected this argument and held that "a mandatory service fee on the collection and removal of residential refuse regardless of actual use, in order to prevent a health menace from imperiling an entire community, is a reasonable and valid exercise of police powers granted to the City of Princeton under W. Va. Code 8-13-13 (1971)." Id. at syllabus point 2. In arriving at our conclusion we stated that "[a]ll residents, regardless of how they personally choose to dispose of their refuse, receive a benefit in the collection and disposal of refuse from other premises in the community." Id. at ___, 466 S.E.2d at 539.

"plenary power and authority" language than we did under W. Va. Code, 8-4-20 [1933]. See syl. pt. 2, City of Princeton v. Stamper, ___ W. Va. ___, 466 S.E.2d 536 (1995) (Upholding an ordinance which imposes a "service fee on the collection and removal of residential refuse regardless of actual use, . . . is a reasonable and valid exercise of police powers granted to the City of Princeton under W. Va. Code, 8-13-13 (1971)."). More relevant to the cases before us, in McCoy this Court held that imposing a charge on the property owner for fire protection services was a reasonable exercise of power granted to the City of Sistersville under the predecessor to W. Va. Code, 8-13-13 [1971], although this Court warned that basing the charge on the value of the property could violate the Tax Limitation Amendment of our state constitution. Thus, McCoy does not support the Bacons' argument.

Similarly, in this case, all property owners benefit from the flood wall protection services. The Bacons, however, disagree and argue that the facts in their case are more akin to the facts in Duling Bros. Co. v. City of Huntington, 120 W. Va. 85, 196 S.E. 552 (1938). In Duling this Court upheld a plan devised by city council which imposed special assessments on certain properties , but not others, in order to pay for the construction of the flood wall in Huntington. Though the city council did not assess property which had never been flooded, as it did not benefit from the flood wall protection, it did assess land submerged by the 1937 flood and land covered in lesser floods.

The Bacons argue that the assessment at issue in Duling, which was authorized by Acts 1935, c. 68 rather than the predecessor to W. Va. Code, 8-13-13 [1971], is not unlike a user fee which can only be charged to a user of the service who benefits from the service. Though we do not quarrel with the Bacons' statement that the user of the service must benefit therefrom, "[i]t is not requisite to the validity of an assessment . . . that the benefits be immediate or direct or that protection from floods be absolute. Municipal determination of the lands benefited, unless arbitrarily exercised, will not be disturbed by the courts." Syl. pt. 4, in relevant part, Duling Bros. Co., supra.

Therefore, while the Bacons may not immediately or directly benefit from the flood protection service fee, the City has determined that all property owners benefit from flood protections services which gives the ordinance "a presumptive validity[. Therefore, this] . . . court should not hold the ordinance to be invalid unless it is clear that the ordinance is unreasonable." Ellison, 168 W. Va at 472, 284 S.E.2d at 906 (citation omitted). We do not find that the ordinance is unreasonable. Thus, the circuit court did not err in ordering the Bacons to pay the municipal service fee.

Third, the Board of Education argues that because it is prohibited from expending money except on those items which are expressly authorized by statute, the City may not

impose the municipal service fee on it. The Board of Education relies on Honaker v. Board of Education, 42 W. Va. 170, 24 S.E. 544 (1896), which held that a board of education can only exercise power which is expressly conferred upon it by statute.

Conversely, the City maintains that this Court has addressed this issue in City of Charleston v. Board of Education, 158 W. Va. 141, 145-46, 209 S.E.2d 55, 57 (1974) and has concluded that

> [i]t would appear from the authorities that the statute authorizing the City to charge the fee for fire protection to property owners who are the users of such service [W. Va. Code, 8-13-13] gives the City the power and authority to make such charges against the Board of Education of Kanawha County because such fee is not a tax and whether or not it is collectible from the Board of Education does not relieve the Board of a **moral obligation** to pay for such protection or service.

(emphasis added). In that we agree with the Board of Education's assertion that a board of education can only exercise power which is expressly conferred upon it by statute, and therefore, does not have a "moral obligation' to do anything, we now revisit our analysis in City of Charleston.

In syllabus point 4 of Shinn v. Board of Education, 39 W. Va. 497, 20 S.E. 604 (1894), we held:

> The Board of Education of a school-district is a corporation created by statute with functions of a public nature expressly given and no other; and it can exercise no power not expressly conferred or fairly arising from necessary implication, and in no other mode

than that prescribed or authorized by the statute.

See Bailey v. Truby, 174 W. Va. 8, 15, 321 S.E.2d 302, 309 (1984). See also syl. pt. 1, Evans v. Hutchinson, 158 W. Va. 359, 214 S.E.2d 453 (1975); Board of Education v. Commercial Casualty Insurance Co., 116 W. Va. 503, 506, 182 S.E. 87, 89 (1935); Herald v. Board of Education, 65 W. Va. 765, 65 S.E. 102 (1909); and Honaker, supra. W. Va. Code, 18-5-1, et seq. sets forth the authority of county boards of education. More specific to the issue now before us, W. Va. Code, 18-5-9 [1933] states:

> The [county board of education] **shall** provide:
>
> (1) By purchase, lease, building or otherwise, a sufficient number of suitable schoolhouses and other buildings to meet the educational needs of its district;
>
> (2) The necessary furniture, fixtures, apparatus, fuel and all necessary supplies for the schools;
>
> (3) **For the health and cleanliness of the pupils**;
>
> (4) **For the repair and good order of the school grounds, buildings and equipment.**
>
> The board may also provide for medical and dental clinics.

(emphasis added). Obviously, the above language authorizes the Board of Education to pay the municipal service fee imposed by the City. After all, fire and flood protection services protect the health of pupils and keep school grounds and buildings in good order, and W. Va. Code, 18-5-9 [1933] clearly mandates the Board of Education to protect the health of pupils and to keep school grounds and buildings

in good order. See syl. pt. 1, State v. Warner, 172 W. Va. 502, 308 S.E.2d 142 (1983) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.")

Moreover, although the legislature specifically stated that "[a]ll public school property used for school purposes shall be exempt from execution or other process, and free from lien or distress for taxes or municipal, county or state levies[,]" W. Va. Code, 18-5-5 [1933] is silent as to whether the Board of Education is exempt from paying fees imposed by the City pursuant to W. Va. Code, 8-13-13 [1971] on the users of essential or special municipal services. W. Va. Code, 18-5-5 [1933], in relevant part. We have been unable to find, nor did the parties supply us with, any statute which specifically exempts the Board of Education from paying such fees. A general rule of statutory construction is that "the exclusion of one subject or thing in a statute is the inclusion of all others." Johnson v. Continental Casualty Co., 157 W. Va. 572, 578, 201 S.E.2d 292, 296 (1973) (citations omitted).

Therefore, although we disapprove of the analysis used in City of Charleston, supra, we agree with the result. Accordingly, we hold that pursuant to W. Va. Code, 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality for fire and flood protection services pursuant to W. Va. Code, 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order.

III.

We make the above holdings with reservations. This Court has previously recognized "the financial plight of municipalities and the continuing need to generate revenue." Hare, 171 W. Va. at 290, 298 S.E.2d at 826. However, our approval today as to the imposition of the fee on the Bacons and the Board of Education should not open the "floodgates"

to creative financing so that a municipality fees a citizen to death, thereby doing exactly what the Tax Limitation Amendment in W. Va. Const. art. X, § 1 sought to prevent. For this reason, we strongly encourage the legislature to revisit W. Va. Code, 8-13-13 [1971] and attempt to more explicitly define the authority of municipalities to impose user fees or charges so as to protect our state citizens. The legislature should specifically list who, if anyone, is exempt from paying the user fee. If and when the legislature makes such a list, it should be mindful of the provisions of the West Virginia Constitution, such as our equal protection provision.[12] we cannot read the minds of the legislators and consistently guess how they would resolve the issues arising under that Code section. Thus, the legislature is the more appropriate branch to reconcile the problems which have arisen under W. Va. Code, 8-13-13 [1971]. However, when resolving these problems, neither this Court nor the legislature may ignore the West Virginia Constitution. Although not an issue now before us, we have grave concerns as to what the implications of exempting certain

---

[12] Because W. Va. Code, 8-13-13 [1971] is not explicit, this Court has been forced to resolve the issues arising under that Code section on a case-by-case basis. The results have led to decisions which are not easily harmonized. The difficulty this Court faces is trying to resolve the issues arising under W. Va. Code, 8-13-13 [1971] in a consistent manner while at the same time still properly defer to the legislature. However, we cannot read the minds of the legislators and consistently guess how they would resolve the issues arising under that *Code* section. Thus, the legislature is the more appropriate branch to reconcile the problems which have risen under *W. Va.Code,* 8-13-13 [1971]. However, when resolving these problems, neither this Court nor the legislature may ignore the *West Virginia Constitution.* Although not an issue now before us, we have have grave concerns as to what the implications of exempting certain persons, governmental entities or other similar categories of users from paying a charge imposed pursuant to *W. Va. Code,* 8-13-13 [1971] will be under the equal protection clause of our Constitution. Therefore, we strongly encourage the legislature to provide explicit guidance to municipalities as to how a charge is to be imposed pursuant to *W. Va. Code*, 8-13-13 [1971] so as not to run afoul of any of the provisions of the *West Virginia Constitution.*

persons, governmental entities or other similar categories of users from paying a charge imposed pursuant to W. Va. Code, 8-13-13 [1971] will be under the equal protection clause of our Constitution. Therefore, we strongly encourage the legislature to provide explicit guidance to municipalities as to how a charge is to be imposed pursuant to W. Va. Code, 8-13-13 [1971] so as not to run afoul of any of the provisions of the West Virginia Constitution. Moreover, because W. Va. Code, 18-5-9 [1993], which outlines the authority of county boards of education, is very broad, we encourage the legislature to revisit that code section to clarify for the county boards of education what their obligation is pursuant to that Code section.

In summary, we affirm the circuit court's entry of summary judgment for the City in The City of Huntington v. John A. Bacon. Additionally, we have answered the certified question in The City of Huntington v. The Cabell County Board of Education as follows: (1) The Fourth Circuit Court of Appeals decision in City of Huntington does not collaterally estop the City from raising the issue of whether the municipal service fee is a fee or tax; (2) the municipal service fee is a fee and not a tax; and (3) the legislature authorized the Board of Education to pay the municipal service fee at issue in W. Va. Code, 18-5-9 [1993].

No. 23067 - Affirmed.

No. 23070 - Certified Question Answered

UNITED STATES of America,
Plaintiff - Appellant,

v.

CITY OF HUNTINGTON, WEST VIRGINIA,
Defendant - Appellee.

No. 92-2074

United States Court of Appeals, Fourth Circuit.

Argued: March 2, 1993
Decided: June 10, 1993
Entered: June 10, 1993

Amended by Order Filed July 12, 1993.

United States brought action to enjoin city from assessing or collecting fee against federal agencies owning property in city. The United States District Court for the Southern District of West Virginia, 793, F.Supp. 1370, Charles H. Haden II, Chief Judge, entered judgment for city, and United States appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that fee charged by city arose from federal agencies' status as property owners, not from their use of city service, so that they were immune from liability for fee.

Reversed and remanded with instructions.

Edward T. Perelmuter, Tax Div., U.S. Dept. of Justice, Washington, D.C., argued (James A. Bruton, Acting Asst. Atty. Gen., Gary R. Allen, David English Carmack, Tax Div., U.S. Dept. of Justice, Washington, D.C.; Michael W. Carey, U.S. Atty., Charleston, WV, on brief), for plaintiff-appellant.

Frederick G. Staker, III, City Atty., City of Huntington, Huntington, WV, argued, for defendant-appellee.

Before HALL and LUTTIG, Circuit Judges, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

OPINION

K.K. HALL, Circuit Judge:

The United States appeals an order declaring that federal agencies that own property in the City of Huntington, West Virginia ("City") are liable for the payment of a municipal service fee imposed by the City. We hold that the service fee is a tax from which the United States in immune, and, accordingly, we reverse.

I.

West Virginia Code §8-13-13 authorizes any city that "furnishes any essential or special municipal service, including, but not limited to, police and fire protection ... to impose upon the users of such service reasonable rates, fees and charges... ." In 1985, the City enacted an ordinance that imposed a "fire service fee" against owners of residential and commercial buildings. A Flood protection fee was added in 1987, and, in 1990, these two fees were combined into a single "municipal service fee". Infrastructure improvements were added in 1991 as another purpose for which the fees could be used. From its inception in 1985, the fee has been assessed on the basis of square footage of the buildings in the City.[1] Civil penalties are available for delinquent accounts.

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[1] The square-footage method of assessment was a response to state constitutional limitations on *ad valorem* taxation. *See Hare v. City of Wheeling*, 171 W. Va. 284, 298 S.E.2d 820 (1982); *City of Fairmont*

The City assessed the fee against federal agencies owning property in Huntington, including the General Services Administration ("GSA") and the United States Postal Service ("USPS").[2] These two agencies refused to pay the fee, and the City assessed penalties and instituted collection proceedings in state court. The United States then filed a complaint in federal court asking that the City be enjoined from assessing or trying to collect the tax against the GSA and USPS.[3] The federal agencies also requested that the court declare that they were immune from that fee.

On cross-motions for summary judgment, the district court ruled that GSA and USPS must pay the fees, but that they were not liable for penalties or interest, 793 F.Supp. 1370. The United States appeals; the City does not cross-appeal the injunction against the collection of penalties and interest.

II

[1] The general principle that states cannot tax the United States derives from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Although the immunity of the federal government and its instrumentalities has been the source of

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v. Pitrolo Pontiac-Cadillac Co., 172 W. Va. 505, 308 S.E.2d 527 (1983), *cert. Denied*, 466 U.S. 958, 104 S. Ct. 2169, 80 L.Ed.2d 553 (1984).

[2] Since 1985, §773.04(c) of the City code has provided as follows: "*Governmental Buildings and Structures.* The City hereby authorized to negotiate with the County, State and Federal Governments in order to fix an agreement with them so that the City may provide fire protection service to buildings and structures owned by these governments and located within the City." The record does not disclose whether any attempt to negotiate with the agencies was ever undertaken.

[3] There are other federal agencies in the City that own property, but the order mentions only GSA and USPS. According to the appellant's brief, these other federal agencies are not parties to this litigation. Appellant's Brief at 10, n. 14.

often conflicting decisions, "[t]he one constant ... is simple enough to express: a State may not, consistent with the Supremacy Clause, U.S. Const., Art. VI, cl. 2, lay a tax 'directly upon the United States' ... . [T]he Court has never questioned the propriety of absolute immunity from state taxation." *United States v. New Mexico*, 455 U.S. 720, 733, 102 S.Ct. 1373, 1382, 71 L.Ed.2d 580 (1982) (quoting *Mayo v. United States*, 319 U.S. 441, 447, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504 (1943)). *If* the service fee is a tax, then immunity is clear.

[2] Although the Supreme Court has never established a specific standard for determining when a particular assessment is a tax, the Court has consistently adhered to the general rule that what must be considered is "the real nature of the tax and its effect upon the federal right asserted." *United States v. Allegheny County*, 322 U.S. 174, 184, 64 S.Ct. 908, 914, 88 L.Ed. 1209 (1944) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367-68. 50 S.Ct. 121, 123, 74 L.Ed. 478 (1930)). The proper analysis to arrive at the real nature of the assessment is to examine "all the facts and circumstances ... and assess them on the basis of economic realities ... ." *United States v. City of Columbia, Mo.*, 914 F.2d 151, 154 (8th Cir. 1990).[4] Under this analysis, we conclude that the service fee imposed by the City is a tax in the most classic sense of the term.[5]

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[4] For the purpose of determining claim priority in the context of bankruptcy, the courts have established the following elements of a tax: "(a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) Imposed by, or under authority of the legislature; (c) for public purposes, including the purpose of defraying expenses of government of undertaking authorized by it; and (d) Under police or taxing power of the state." *In Re Lorber Industries*, 675 F.2d 1062 (9th Cir. 1982). The "user fee" at issue in the instant case clearly qualifies as a tax under this definition.

[5] The district court reached its result by three different tests, including the one we have chosen. The first test asked whether the fee is an enforced contribution to provide for the support of government. *See United States v. Maryland*, 471 F.Supp. 1030, 1036 (D.Md. 1979). It

[3] The United States must pay reasonable user fees. For instance, charges for services from city-owned utilities are clearly fees for which federal government would be liable to the same extent as any other customer. *See United States v. Harford Co., Md.*, 572 F.Supp. 239, 241 (D.Md. 1983) ("The federal government has ... recognized its obligation to pay state or county charges based on the *quantum* of water or sewer services rendered.") (emphasis in original). But not every assessment tied to state-provided benefit is a user fee.

Fire and flood protection and street maintenance are core government services. *See Mullen Benev. Corp. v. United States*, 290 U.S. 89, 54 S.Ct. 38, 78 L.Ed. 192 (1933) (United States immune from liability for "taxes in the nature of reassessments for sewers and sidewalks."); *see also Federal Reserve Bank v. Metro Center Improvement District #1*, 657 F.2d 183 (8th Cir. 1981), *aff'd*, 455 U.S. 995, 102 S.Ct. 1625, 71 L.Ed.2d 857 (1982) (federal immunity from taxation includes immunity from special assessment on real estate owned by federal instrumentality); *United State v. Harford Co., Md.*, 572 F.Supp. 239 (D.Md. 1983) (front-foot assessment for the financing of county water and sewer construction projects are taxes from which the federal government was immune). Under the theory advanced by the City, virtually all of what now are considered "taxes"

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begs the question to conclude, as did the district court, that the service fee is not a tax because it is intended to recoup funds expended for fire and flood protection.

The third test derives from cases dealing with federal taxation of state governments. *See United States v. Maine*, 524 F.Supp. 1056 (D.Me 1981) (applying a 3-part test: (1) is the charge imposed in a nondiscriminatory manner; (2) is the charge a fair approximation of the benefits received; and (3) is the charge structured to produce revenues that will not exceed the total costs to the government of the benefits to be supplied). Inasmuch as "[t]he states' immunity from federal taxation is more limited than the federal government's immunity from state taxation, and is base on a different constitutional source," (*United States v. City of Columbia, Mo.*, 914 F.2d 151, 153-54 (8th Cir. 1990)), we are of the opinion that the *United States v. Maine* test is inapplicable here.

could be transmuted into "user fees" by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g. a "police fee."

[4] User fees are payments given in return for as government-provided benefit. Taxes, on the other hand, are "enforced contribution[s] for the support of government." *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 280, 75 L.Ed. 551 (1931). Liability for the "user fee" charged by the City arises from GSA's and USPS's status as property owners and not from their use of a City service.[6] *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287, 96 S.Ct. 535, 541, 46 L.Ed.2d 495 (1976) ("[Ad valorem] property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth ...").

We are unable to discern any relevant difference between the square-footage method of assessment and the ad valorem method. The service fee is a thinly disguised tax, and, as such, the USPS and GSA are immune from liability for it.

We reverse the judgment of the district court, and we remand with instructions to enter judgment for the United States.

REVERSED AND REMANDED WITH INSTRUCTIONS.

---

[6] Indeed, the federal government has waived immunity to extent that it actually receives fire protection services. The City may file a claim against the United States for reimbursement of direct costs incurred putting out a fire on federally-owned property. *See 15 U.S.. §2210(a).*

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 28th day of January, 1999, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

AND

The City of Huntington, a West Virginia municipal corporation, Plaintiff Below, Appellee

vs.) No. 25401

Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Defendant Below, Appellant

AND

Wheeling College, Inc., West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, Plaintiffs Below, Appellants

vs.) No. 25402

The City of Wheeling, a municipal corporation, Defendant Below, Appellee

AND

The City of Wheeling, a municipal corporation, Plaintiff Below, Appellee

vs.

The Ohio County Board of Education, Defendant Below, Appellant

The Court, having maturely considered the petition for rehearing and reargument filed by the appellants, Wheeling College, Inc., a West Virginia corporation, the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, and the Ohio County Board of Education, and the written response filed in opposition thereto, and the petition for rehearing and reargument filed by the appellants, Grandeotto, Inc., a corporation, Bernard J. and Kathy A. Folio, Mid-City Land Co., Bernard J. Folio, d/b/a Highrise Associates, Kathryn Folio, and Joseph Folio, in the above-captioned cases, is of opinion to, and doth hereby, deny the petitions for rehearing. Justices Maynard and McGraw would grant.

A True Copy

Attest: Deborah Z. McHenry
Clerk, Supreme Court of Appeals

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI. - MISCELLANEOUS PROVISIONS

Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 8-13-13. Special charges for municipal services.

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance: Provided, That any sewerage and sewage disposal service and any service incident to the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter shall be subject to the provisions of chapter twenty-four [§ 24-1-1 et seq.], of this code. The municipality shall not, however, have a lien on any property as security for payments due under such ordinance. Notwithstanding the provisions of section four [§ 8-11-4], article eleven of this chapter, any ordinance enacted or substantially amended under the provisions of this section shall be published as a Class II legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this code, and the publication area for such publication shall be such municipality. In the event thirty percent of the qualified voters of the municipality by petition duly signed by them in their own handwriting and filed with the recorder of the municipality within fifteen days after the expiration of such publication protest against such ordinance as enacted or amended, the ordinance shall not become effective until it shall be ratified by a majority of the legal votes cast thereon by the qualified voters of such

municipality at a regular municipal election or special municipal election, as the governing body shall direct. Voting thereon shall not take place until after notice of such submission shall have been given by publication as above provided for the publication of the ordinance after it is adopted or substantially amended. The powers and authority hereby granted to municipalities and to the governing bodies thereof are in addition and supplemental to the powers and authority named in any charters thereof. Notwithstanding any other provisions of this section, in the event rates, fees and charges herein provided for shall be imposed by the governing body of any municipality for the purpose of replacing and in amounts approximately sufficient to replace in its general fund such amounts as shall be appropriated to be paid out of ad valorem taxes upon property within the municipality pursuant to an election duly called and held under the Constitution and laws of the State to authorize the issuance and sale of general obligation bonds of the municipality for public improvement purposes, in the call for which election it shall be stated that the governing body of the municipality proposes to impose rates, fees and charges in specified amounts under this section for the use of one or more of the services above specified, which shall be related to the public improvement proposed to be made with the proceeds of the bonds, no notice, publication of notice, or referendum or election or other condition or prerequisite to the imposition of such rates, fees and charges shall be required or necessary other than the legal requirements for issuance and sale of such general obligation bonds. (1921, c. 111, §§1, 2; Code 1923, c. 47, § 62; 1933, Ex. Sess., c. 27; 1937, c. 56; 1951, c. 134; 1955, c. 119; 1959, c. 115; 1961, c. 99; 1967, c. 105; 1969, c. 86; 1971, c. 99.)

ARTICLE 957

MUNICIPAL FIRE AND SOLID WASTE COLLECTION CHARGE

957.11 RATES; FEES; CHARGES ESTABLISHED

(a) The fees or charges levied, imposed and assessed pursuant to this article for the maintenance, continuance, and improvement of fire protection service and for collection of solid waste and solid waster container shall be as follows:

	FEE - WASTE COLLECTION	FIRE - FEE PROTECTION SERVICE
Owner Residential Unit Structure	$78.00 per year	$60.00 per year
Owner Dual Residential Unit Structure	$156.00 per year	$60.00 per year
Owner Multiple Family Residential Unit Structure	Table I or II	$.045 x Gross Square Feet - Minimum $36.00 Per Year (Total Number of Square feet contained in the structure multiplied by Four and One Half Cents [.045] Per Year)

Owner Non-Residential Unit Structure	Table I or II	$.045 x Gross Square Feet - Minimum $36.00 Per Year (Total Number of Square feet contained in the structure multiplied by Four and One Half Cents [.045] Per Year)
Nonresidential Tenant Unit Structure	Table I or II	$.0225 x Gross Square Feet - Minimum $36.00 Per Year (Total Number of Square feet contained in the structure multiplied by Two and One Half Quarter Cents [.0225] Per Yr)
Vehicles - Owner or Lessee - N/A -		$9.00 per year

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

CITY OF CLARKSBURG, VS. GRANDEOTTO, INC.	Civil Action No. 93-C-609-2
CITY OF CLARKSBURG, VS. BERNARD J. and KATHY A. FOLIO	Civil Action No. 93-C-648-2
CITY OF CLARKSBURG, VS. MECH-FAB, INC.	Civil Action No. 93-C-610-2
CITY OF CLARKSBURG, VS. MID-CITY LAND CO.	Civil Action No. 93-C-706-2
CITY OF CLARKSBURG, VS. BERNARD J. FOLIO, d/b/a HIGHRISE ASSOCIATES	Civil Action No. 93-C-707-2
CITY OF CLARKSBURG, VS. KATHRYN V. FOLIO	Civil Action No. 94-C-184-1
CITY OF CLARKSBURG, VS. JOSEPH A. FOLIO	Civil Action No. 94-C-326-1

PLAINTIFF'S ANSWERS TO DEFENDANTS SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

INTERROGATORIES

* * *

INTERROGATORY NO. 5: State the level of taxation the City of Clarksburg attained at all times between January 1, 1990 and June 30, 1993 and the maximum level of taxation the City of Clarksburg is lawfully entitled to attain by virtue of the West Virginia Tax Limitation Amendment. (W. Va. Const. Amd. X, §1).

(a) Attach all documents and correspondence or authority relied upon, used or generated in connection with your answer above.

ANSWER: Level of taxation of the City of Clarksburg January 1, 1990 and June 30, 1993.
Class I Property 12 ½ cents per $100 assessed valuation
Class II Property 25 cents per $100 assessed valuation
Class IV Property 50 cents per $100 assessed valuation

Maximum level of taxation
Class I Property 12 ½ cents per $100 assessed valuation
Class II Property 25 cents per $100 assessed valuation
Class IV Property 50 cents per $100 assessed valuation

(a) The documents establishing the City's level of taxation for the period January 1, 1990 through June 30, 1993 are shown on the levy page of annual Levy Estimate (Budget) document for fiscal years 1989-90, 1990-91, 1991-92, 1992-93 approved by Council. Copies of these documents are attached.

Supreme Court, U.S.
FILED
MAY 28 1999
CLERK

No. 98-1752

IN THE

Supreme Court of the United States

GRANDEOTTO, INC., a corporation;
BERNARD J. and KATHY A. FOLIO;
MID-CITY LAND CO.;
BERNARD J. FOLIO, d/b/a Highrise Associates;
KATHRYN FOLIO; JOSEPH FOLIO,

Petitioners,

v.

CITY OF CLARKSBURG, a municipal corporation,

Respondent.

On Petition for a Writ of Certiorari
to the West Virginia Supreme Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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Appendix — Excerpts From Article 957, Chapter 5, Part 9 Of The Codified Ordinances Of The City Of Clarksburg, West Virginia 1a

STATEMENT OF THE CASE

The City of Clarksburg is a community of about 19,000 people located in north central West Virginia, approximately 125 miles south of Pittsburgh, Pennsylvania, and 250 miles west of Washington, D.C. It is the seat of government for Harrison County, West Virginia. In 1983, under the authority of W. Va. Code § 8-13-13, Clarksburg enacted an ordinance providing for the payment of Fire Protection Service Fees by users of such services, such "users" being defined as the owners and tenants of the residential, commercial and industrial buildings within the city. The Ordinance was amended in 1985, 1989 and 1992, and is currently designated Article 957, Chapter 5, Part 9 of the Codified Ordinances of the City of Clarksburg, West Virginia, of 1981, as Amended.

Based on legislative findings that the size and use of a building are factors that directly affect the cost of providing fire protection services, Clarksburg devised a classification scheme that attempted to fairly distribute the cost of fire protection services. Owners of "residential unit structures" and "dual residential structures" are assessed a flat annual rate; owners of "multiple family residential structures" and "non-residential unit structures" are assessed at a rate based on square footage of the building; and tenants of non-residential unit structures were assessed at a lesser rate based on the square footage of the structure rented.

The sole purpose of the Fire Protection Service Fee is to defray the cost and expense of providing fire protection services to property owners within Clarksburg. The proceeds generated from the collection of the Fire Protection Service Fee are wholly earmarked to the fire department of

the City of Clarksburg. The fee generates approximately $750,000 in revenue per year, which covers approximately 42% of the fire department's annual budget of $1,809,000.

Petitioners are owners of residential and nonresidential structures within Clarksburg and are required to pay fees under the Ordinance. Since the enactment of the Ordinance in 1981, Petitioners have been engaged in eighteen years of almost constant litigation with Clarksburg. Petitioners have refused to pay the fees assessed against their properties, and challenged the validity of the Ordinance and its amendments in both West Virginia and Federal Courts, including the United States Court of Appeals for the Fourth Circuit, and the West Virginia Supreme Court of Appeals. These challenges have been uniformly unsuccessful. No court has found merit in the issues raised by the Petitioners. This appeal is the ultimate culmination of this fruitless litigation.

Petitioners' opposition to the Fire Service Fee was first litigated in a case styled *City of Clarksburg v. Grandeotto, Inc.*, Civil Action No. 84-C-698-1 (Circuit Court of Harrison County). Clarksburg initiated that action in October 1984, to recover unpaid fire service fees. Grandeotto, Inc., a defendant therein and also one of the Petitioners, argued that the Fire Protection Service Fee violated West Virginia's Tax Limitation Amendment (W. Va. Const. Art. X § 1) and that it was unreasonably related to the service provided. By Order entered August 12, 1985, the circuit court rejected such claims and upheld the Ordinance. Grandeotto thereafter filed a Petition for Appeal to the West Virginia Supreme Court of Appeals, which was refused. (*See* Findings of Fact Nos. 45, 46, 47, 48, Memorandum of Decision A. 46).

In 1993 and 1994, Clarksburg commenced seven individual actions against the Petitioners to collect unpaid fire service fees for the years 1990 through 1993. These actions were consolidated by the circuit court. After extensive discovery, the parties each made Motions for Summary Judgment. On July 24, 1997, the court entered its Memorandum of Decision and Order granting Clarksburg judgment against each of the Petitioners for unpaid fees and penalties. The Petitioners then appealed to the West Virginia Supreme Court of Appeals, which, by Order entered on May 14, 1998, agreed to hear their appeal. Subsequently, this case (designated No. 25143) was consolidated with appeals from Ohio County and Cabell County, West Virginia, which concerned challenges to similar Fire Protection Service Fee ordinances of the cities of Huntington and Wheeling. In those cases, however, the property owners challenging the ordinances were the Catholic Diocese of Wheeling-Charleston (Nos. 25401 and 25402), Wheeling College and the Ohio County Board of Education (No. 25402). These property owners claimed, in part, that because their churches and schools are exempt from West Virginia's *ad valorem* property tax under West Virginia Code § 11-3-9, such buildings should also be exempt from the municipal fire protection service fees of Huntington and Wheeling, respectively. In its decision of December 15, 1998, the West Virginia Supreme Court of Appeals rejected that, and all other arguments made by the property owners. Only these Petitioners have appealed that decision to this Court.[1]

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1. Contrary to the Petitioners' assertion that the West Virginia Supreme Court upheld the fire protection service fees in all three of the cases by a vote of 3 to 2 (Petition Pg. 5), the vote was unanimous as to these Petitioners. In footnote 1 of the dissenting

(Cont'd)

In August 1997, Clarksburg was forced to institute yet another civil action against the Petitioners for unpaid fire service fees for the years 1994 through most of 1997 in Harrison County Circuit Court, designated Civil Action 97-C-366-1. That case has been stayed pending the outcome of this action.

In 1996, concurrent with the long pendency of this case, the Petitioners instituted what they describe as a "parallel" challenge to Clarksburg's Ordinance in the United States District Court for the Northern District of West Virginia, in which they asserted, among other things, that Clarksburg's Ordinance, as it is related to fire protection, violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and sought both declaratory and injunctive relief. That case was dismissed by the district court for lack of subject matter jurisdiction, pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, upon Clarksburg's Rule 12(b)(1) F.R.C.P. Motion.

The Petitioners appealed the dismissal of their so called "parallel" challenge to the United States Court of Appeals

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opinion, Justice Maynard specifically noted that his dissent (in which Justice McCusky joined) was limited to

> . . . Case Nos. 25401 and 25402 involving the Roman Catholic Diocese, schools and schools and boards of education. I believe there is no reason the appellants in Case No. 25313 [the Petitioners herein] should not pay the "fee" at issue since, unlike churches and schools, they are not exempted under W.Va. Code § 11-3-9.

(App 15.)

for the Fourth Circuit. The Fourth Circuit upheld the district court's dismissal, finding that the Tax Injunction Act barred jurisdiction and rejecting all of Petitioners' claims. *Folio v. City of Clarksburg*, 134 F.3d 1211 (4th Cir. 1998) (A.33).

REASONS FOR DENYING THE WRIT

This Petition does not deserve the attention of this Court. The essence of Petitioners' argument is that their various challenges to the Fire Protection Service Fee have been improperly rejected or ignored by every West Virginia and federal court which has heard such claims. With the filing of the Petition before this Court, Petitioners have challenged the validity of Clarksburg's Fire Protection Service Fee in every possible West Virginia and federal court. No court has found merit in any of these attacks.

Throughout each stage of this litigation, the Petitioners have asserted that the court immediately below has failed to "follow its constitutional duties" or acted in an arbitrary and/or unfair fashion in rejecting the Petitioners' various (and ever changing) objections to Clarksburg's Fire Protection Service Fee Ordinance. Then, after being rebuffed once again, they make similar complaints to the next level of appeal. The Petition is simply more of the same, and sets forth no valid ground that would justify a granting of certiorari by this Honorable Court.

I.

IN THIS APPEAL, THE CENTRAL QUESTION ADDRESSED BY THE WEST VIRGINIA SUPREME COURT IS SOLELY A QUESTION OF STATE LAW, AND NO FEDERAL QUESTION EXISTS.

The Petitioners' position is, essentially, that the Fire Protection Service Fee cannot be a "fee" under state law, (for the purposes of the West Virginia Tax Limitation Amendment) while being classified as a "tax" in federal court for the purposes of either the Tax Injunction Act, as in *Folio v. City of Clarksburg*, or under the Supremacy Clause, as in *United States v. Huntington*, 999 F.2d 71 (4th Cir., 1993), *cert. den.*, __ U.S. __, 114 S. Ct. 1048, (1994). Petitioners assert that the two court systems have somehow violated their "federal due process" rights by reaching decisions which are "polar opposites" or "diametrically opposed." This position is clearly meritless. The West Virginia and federal courts have simply applied different bodies of law to answer what are clearly different questions.

The Petitioners' obsession with the label given to the fire protection service fee assessment (tax vs. fee) is not relevant in this appeal, because that distinction is meaningful only under West Virginia law. The West Virginia Constitution, Art. X, § 1 (the Tax Limitation Amendment) limits the level of *ad valorem* property taxation which may be levied on real property. Petitioners argued below that the Fire Protection Service Fee is a "tax" (presumably related to value) and therefore violates the Tax Limitation Amendment. This proposition was explicitly rejected below by the West Virginia Supreme Court relying

on its decision in *Bacon v. Huntington*, 196 W. Va., 457, 473 S.E.2d 743 (1996). Petitioners nonetheless persist in raising this inapplicable argument before this Court. They have attempted to manufacture a federal question by reinventing the "tax vs. fee" issue as an unconstitutional "taking," but offer no authority supporting that proposition. In reality, there is nothing for this Court to decide because the question is solely one of state law. It simply does not matter whether the Fire Protection Service Fee is a "fee" or a "tax" because no federal question is presented herein. This Court has long made clear its reluctance to interfere with the revenue generation efforts of the states, and that it will do so only under circumstances when a measure imposed by a state has clearly violated limitations imposed by the United States Constitution. *King v. Mullins*, 171 U.S. 404 (1898); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940).

The Petitioners' position below as to this issue is based on a clear misapplication of the relevant standards. The West Virginia Supreme Court of Appeals resolved the issue of whether the Clarksburg Fire Protection Service Fee is in violation of Article X § 1 of the West Virginia Constitution, also known as the "Tax v. Fee" issue, in the 1996 case *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996), and reaffirmed that decision in this case. Below, the Petitioners argued that Clarksburg's Fire Protection Service Fee is, in reality, an *ad valorem* tax rather than a municipal fee and, therefore, violates the Tax Limitation Amendment. Petitioners' argument is substantially based upon their total mischaracterization of the holding in *United States v. Huntington*, 999 F.2d 71 (4th Cir. 1993). In that case, the Fourth Circuit held that Huntington's municipal service fee could not be assessed against Federally

owned property within Huntington's corporate boundaries, on the grounds United States has immunity from taxation by a state or its political subdivision, pursuant to the Supremacy Clause (Art. VI, cl 2.). This general principle was, of course, first articulated by Chief Justice Marshall in the seminal opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Subsequently, in *Bacon*, private property owners from Huntington asserted that the Fourth Circuit's ruling collaterally estopped Huntington from assessing its municipal service fee against them, because as a "tax," and not a "fee" the assessment would violate the Tax Limitation Amendment. The West Virginia court considered and rejected that assertion, holding:

> An ordinance which imposes a municipal service fee pursuant to *W. Va. Code*, 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W. Va. Const.* Art. X, § 1.

City of Huntington v. Bacon, 196 W. Va. 457, 473 S.E.2d 743, 753-54 (1996).

Bacon not only specifically recognized the immunity provided by the Supremacy Clause to the federal government, and its intstrumentalities from state and local taxation but also that the determination of what is and is not a "tax" for that purpose resides solely in the federal courts. Conversely, the *Bacon* court acknowledged that this Court has made it clear that the states are free to choose their own fiscal policies:

> The state is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject, so far as federal power is concerned, to the constricting regulations of the Constitution of the United States.

City of Huntington v. Bacon, 473 S.E.2d at 750, *citing Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 151 (1911). Accordingly, the West Virginia Supreme Court determined that it was not bound by the Fourth Circuit's determination in *United States v. Huntington* insofar as non-federally owned property is at issue. Since the *Bacon* appellants were not federal instrumentalities, no "Federal Right" was involved and, therefore, the Constitutional immunity granted to the United States did not extend to private property owners.

Petitioners' failure to qualify as an instrumentality or agency of the government of the United States is no deterrent to their desire to apply the Fourth Circuit's decision in *United States v. City of Huntington* to themselves. They continue to misconstrue the West Virginia Supreme Court's use of the term "federal right," by using it to refer to their own constitutional rights (Pet. 14-17). By this twisted logic Petitioners assert that since they have made constitutional due process and equal protection claims in this appeal, which they incorrectly say were not asserted by the appellants in *Bacon*, the Fourth Circuit's decision in *United States v. Huntington* applies to them and, therefore, the fire service protection fee is, in reality, a "tax" and, therefore, a "taking" of their property.

Thus Petitioners assiduously avoid the crux of the distinction between the Fourth Circuit's review of Huntington's municipal service fee and the analysis of the West Virginia court in *Bacon*, which is that the term "federal rights" in this context means the absolute immunity from state taxation provided to the federal government and its instrumentalities, rather than the rights afforded all citizens under the United States Constitution. It is not here suggested that the Petitioners' constitutional claims should not be given their due consideration. It is only pointed out that those courts were considering an entirely different body of law. Petitioners' attempt to take the term "federal right" out of context and attempt to distinguish themselves from the *Bacon* appellants is simple nonsense.

II.

THE WEST VIRGINIA COURTS PROVIDED PETITIONERS WITH FULL AND FAIR OPPORTUNITY TO ARTICULATE THEIR CLAIM THAT CLARKSBURG'S ORDINANCE IS CONSTITUTIONALLY DEFECTIVE.

Petitioners attempt to attract this Court's attention by characterizing their challenge to the Fire Protection Service Fee as a violation of their constitutional rights coupled with an unjust refusal of any of the numerous courts which have heard their claims to sustain such claims. Careful review of their arguments, however, reveals that there is little substance to such claims. The Petitioners now assert that the West Virginia courts have committed an additional constitutional violation by "failing to address" such claims in contravention of the Supremacy Clause. The case law cited in the Petition offers little support for this novel proposition.

Felder v. Casey, 487 U.S. 131 (1988) is cited by Petitioners for the proposition that the Supremacy Clause imposes on state courts a constitutional duty "to proceed in a manner that all the substantial rights of the parties under controlling federal law [are] protected." Petition at 10. At issue in that case, however, was Wisconsin's "notice-of-claim" statute which required a preliminary notice of a claim against a state officer or governmental entity in state court under 42 U.S.C. § 1983, or such action would be barred in Wisconsin's courts.

Likewise, in *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990) this Court reversed a dismissal by Florida's state courts of a § 1983 civil rights action against a local school board on the basis that the school board was absolutely immune from such § 1983 actions under state law. These cases are wholly inapplicable here. Both are § 1983 civil rights actions brought in state court which the states sought to dismiss or bar, pursuant to state law. In this case, Petitioners' claims were given full opportunity to be heard and considered, and not barred from consideration on state law immunity or limitation of actions grounds. To the contrary, the Harrison County Circuit Court explicitly acknowledged and rejected the plaintiff's constitutional claims because Petitioners failed to carry their burden of proof. Mem. of Decision, Findings of Fact 44; Conclusion of Law 4, 5 & 6, A. 46, *see also Folio v. Clarksburg*, 134 F.3d 1211, 1213 (1998) (A. 33). The West Virginia Supreme Court of Appeals also provided the Petitioners full opportunity to make their arguments, and acknowledged their claims in its opinion. Petitioners are correct that the court did not directly address Petitioners' constitutional claims in its opinion, apparently not deeming them of sufficient merit to warrant comment. This hardly is

analogous with the actions of Wisconsin and Florida in the cases cited, both of which sought to slam the door shut in the faces of individuals asserting violations of their civil rights.[2]

III.

THE FIRE PROTECTION SERVICE FEE ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE FEE BEARS A REASONABLE RELATIONSHIP TO A LEGITIMATE GOVERNMENTAL PURPOSE AND ALL PERSONS SIMILARLY SITUATED ARE TREATED EQUALLY.

Petitioners also charge that certain classifications made within Clarksburg's fire protection fee Ordinance are "arbitrary and devoid of any rationale," and therefore violate the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. Specifically, Petitioners assert that the Ordinance is not rationally related to its governmental purposes. The Ordinance makes distinctions between owner-occupied residential unit structures and

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2. It would appear that Petitioners have once again failed to appreciate the difference between a procedural bar to an opportunity to be heard and the failure to persuade a court of the correctness of a position. In the so-called "parallel action" before the district court the Petitioners argued that they had no "plain, speedy and efficient" remedy in West Virginia's courts and the Tax Injunction Act should not apply. This claim was flatly rejected. The Fourth Circuit noted that the Petitioners are not entitled to a guarantee of substantive relief, only procedural certainty that an opportunity will be provided to present federal challenges. *Folio v. Clarksburg*, 134 F.3d 1211, 1215 (1998) App. 38-39.

dual-residential structures which are assessed at a flat annual rate, while owner-occupied multi-family residential structures and non-residential structures are assessed a rate based on the square footage of the building. Tenants of non-residential structures are assessed a lesser rate based on square footage of the structure rented. (*See* Memorandum of Decision and Order, Finding of Fact No. 3, A.47). Petitioners assert, without any factual support in the record, that ". . . a pattern has emerged where commercial owners and tenants have been singled out to bear the brunt of the costs of fire protection without any basis for doing so." Petition at 29.

Under this Court's well established equal protection analysis, a state, or as in this case, a municipality acting under authority of a state statute, may establish reasonable classifications: "Unless a state-imposed classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

> In general, the equal protection clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger, 505 U.S. 1, at 11. (citations omitted). Since there is no suggestion that any suspect characteristic is at issue here, the only showing required of Clarksburg in order to sustain the classifications made by its Fire Protection Service Fee Ordinance is that it had a "plausible policy reason" in establishing the fee. Moreover, as noted by this Court in *Nordlinger*, "the equal protection clause does not demand for the purposes of rational basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. at 15, *citing United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 179.

In this case, the basis for the differing classifications within the Ordinance is expressly set forth in the Ordinance itself. The Clarksburg City Council made explicit legislative findings in the Ordinance that both the size and the use of a building are factors which directly affect the cost of providing fire protection. Council further found that firefighting in nonresidential buildings requires additional equipment and manpower. §§ 957.01(a) and (b). (*See* Appendix, *infra*).

Clearly the legislative finding by itself constitutes a sufficient "plausible policy reason" supporting the classifications of which Petitioners complain. Being prepared to fight fires in "Non-residential" commercial structures is clearly a more costly and demanding proposition to the city fire department than the protection of single family residential dwellings. For example, high rise buildings and hazardous materials contained in commercial or industrial structures present problems which are not a concern with single unit residential structures. Fires in multi-family residential units such as apartment

buildings, by the same token, may also present issues which require specialized training and equipment. Classification of these different types of structures is plainly reasonable and within the prerogative of the City in enacting its fee structure, insofar as equal protection analysis is concerned. Another "plausible policy reason" distinction for the flat rate imposed upon single and dual family residential structures is the avoidance by the city administration of the burden of determining and maintaining records of the square footage of each single family home and duplex within the city as well as the intrusion that such record creation and updating would have upon Clarksburg's homeowners.

Petitioners also complain that the Ordinance requires that tenants are assessed fire service protection fees under the tenant rate and that this creates a situation wherein owner-occupied structures pay less under the Ordinance than leased structures because both the owners and non-residential tenant structures are required to pay fees.

Petitioners refuse to recognize, however, that the tenants of non-residential property are also "users" of fire protection services. Such tenants have a clear interest in the protection of their property from fire, and thereby receive a tangible benefit from the operation of Clarksburg's Fire Department. It is entirely reasonable that Clarksburg imposes its fee upon these commercial tenants. There is no reason to believe that the machinery, inventory, equipment, computers and other property owned and maintained by commercial tenants is less important to its owner than the building in which it is housed is to its landlord. The question is not whether any persons are treated differently under the Ordinance, but rather, whether there is a rational basis for doing so.

Contrary to Petitioners' assertions, the classifications are neither arbitrary nor capricious. Rather they plainly rest upon reasonable distinctions which are closely tied to the governmental purpose of the Ordinance: to defray the cost of providing fire protection to owners of both residential and nonresidential structures. There has been no denial of equal protection of the law.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM ARTICLE 957, CHAPTER 5, PART 9 OF THE CODIFIED ORDINANCES OF THE CITY OF CLARKSBURG, WEST VIRGINIA

ARTICLE 957

MUNICIPAL FIRE AND SOLID WASTE COLLECTION CHARGE

957.01 *CONTINUANCE, MAINTENANCE AND IMPROVEMENT OF FIRE PROTECTION SERVICE AND WASTE COLLECTION SERVICE; LEGISLATIVE PURPOSE*

The service of fire protection and the service of waste collection shall be continued, maintained and improved by the City, in part, at the charge and expense of the owners of buildings and structures of every kind and nature within the City, the occupiers or tenants of such buildings and structures, and the owners of vehicles within the City, which owners and occupiers are declared to be the users and beneficiaries of such fire protection service as contemplated by West Virginia Code 8-13-13.

The charges and expenses with respect to each of such users as set out in this article shall be based and imposed, in part, upon recognition of the following legislative findings:

(a) The size of a building, as reflected by the total square feet, is a factor which affects the cost of providing fire protection and therefore the fees imposed hereunder are related in part to the size of a building.

Appendix

(b) The use of a building is a factor which affects the cost of providing fire protection and accordingly nonresidential property as compared to residential property requires additional equipment and manpower to provide effective fire protection and therefore it is the intent of this article that owners and occupiers of residential buildings pay a lesser charge for fire protection to reflect the reduced cost of protections.

The legislative intent and purposes for both the fire protection service charge approved and adopted in 1983 and Solid Waste Collection charge approved and adopted in 1979 are hereby adopted as continuing. The charges imposed, assessed and levied herein are in accordance with this intent.

* * * *